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Foreword

This report postulates that the optimal functioning of the societies of the OECD countries is dependent on the recognition of the role women play in the economy and on the degree to which they are allowed to put their potential at work for a better economy and society.

The European Union is often represented as a temple-front supported by three pillars: the column of the European Community, the one of the Common Foreign and Security Policy and, finally, the third pillar, Justice and Home Affairs. The subtitle of this report devoted to the improvement of the status of women in the European Community, refers to this metaphor. It speaks of the European temple supported by Caryatids. This imagery may need some explanation.

The Erechtheion is a temple (built 421-405 BC), situated on the northern edge of the Acropolis. One of its galleries is supported by six female figures, the Caryatids. Just as the Erechtheion as a whole rests on columns and Caryatids, European society is supported by men and women. The support of women is indispensable, but still insufficiently recognized. Without the support of women, European Society would collapse like a house of cards.

It is high time that the support of women be recognized and properly valued. The present European treaties, however, do not yet take the basic consideration of full, material equality between women and men as their point of departure. The Intergovernmental Conference (IGC) which started in 1996 under Italian Presidency, offers a unique opportunity to change this state of affairs. In the following report, dr. Joyce Hes, ms. Edith Franssen and ms. Miriam Meertens, all staff members of Rijksuniversiteit Limburg, present a number of well-reasoned, specific proposals for amending the EC Treaty. I hope that, in the framework of the revision of the Maastricht Treaty, which is one of the foundations of European cooperation, these proposals will be widely endorsed. What is at stake is creating a European Union that grants equal rights to all, regardless of sex. Only then will the European Union have a chance to receive the support of all its citizens.

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Maastricht
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Introduction

European unification is a hot issue. Towards the end of March 1996, the preparatory negotiations of the Intergovernmental Conference (IGC) started. The European Community is no longer a purely economic community. We strive for ever further integration in the direction of a political union. In this process of integration, unfortunately the socio-economic position of women still leaves a lot to be desired. Women still take on the bulk of unpaid labour, whereas where they do salaried work their position on the labour market is often precarious from a legal point of view and the jobs they hold offer little perspective careerwise. A solution for the present bottlenecks in the legal position of women in the European Community is sought *inter alia* in the direction indicated by the OECD report *Shaping Structural Change*.⁵⁸ The reinforcement of the status of women is one of the most important keys to economic and social development. In this vision, social justice and economic efficiency go together very well indeed. The report speaks of an "active gender-neutral society." Its characteristics are equal opportunities and choice for women and men, cohesion and solidarity. An active society reacts to changing social and economic needs and its members have an opportunity to influence the direction of those changes. Increasing society's "activity" means taking measures to promote economic and social participation and the recognition that there are many fields in which people can be active both in paid and in unpaid labour.

If this vision, as described in the OECD report is applied to the present situation in the European Community, the policies of that Community with regard to equal treatment of women and men will have to get more body and content. In this context, more opportunities will have to be offered to women in order for them to participate in to the labour market. This, again, not only implies that conditions discriminatory to women need to be abolished, but also that social and biological differences between women and men must be taken into account. Furthermore, paid and unpaid labour will have to be distributed more equally between women and men. The question is how this can be realized and implemented at a European level.

In September 1994, Mrs. Dr. Joyce Hes, senior lecturer at the University of Limburg for Women and Law, put a proposal before the Small Committee Animation-strategies for the Maastricht Treaty for Women project. This Committee is in charge of the appropriation of funds, made available by the Directorate-General V of the European Commission. The proposal was accepted. On 1 July 1995 the project started and has been carried out by Ms. Edith Franssen and Ms. Miriam Meertens. The project was accompanied by a thinktank⁵⁹ and an internal supervisory committee.⁶⁰

On the basis of the proposal put forward, a working plan was formulated. By drawing up an inventory of the present "state of the art" in the field of equal treatment of women and men various lacunae could be identified. To do away with these gaps in the present legislation through a European treaty, "The Maastricht Treaty for Women", when further analyzed turned out to be non feasible both from a political and a legal point of view. First of all, there is already a Convention on the Elimination of Discrimination against Women, to which the Member States of the European Community are a party.

⁵⁸ OECD report: *Shaping Structural Change, the role of women*. Report by a high-level group of experts on women and structural change in the 1990s to the Secretary-General, OECD, Paris, 1991.

⁵⁹ Members of the thinktank were Marjolein van den Brink, Sabine Kraus, Maria van der Leeuw, Truus Ophuysen, Janneke Schippers, Elies Steyger, and Eelco Wierda.

⁶⁰ The internal supervisory committee consisted of Cees Flinterman, Michael Faure, Guus Heerma van Voss and Hildegard Schneider.

A European Women's Treaty identical in purpose to the already existing one has no added value whatsoever. If this European treaty were to differ from the international women's treaty, the question arises as to how these treaties would relate to each other. Secondly, it seemed more appropriate to researchers to link up to the proposals that have been made by various parties to amend the EC Treaty itself to improve the status of women, possibly in the context of the Intergovernmental Conference (IGC). For all these reasons, it was decided to formulate a number of proposals in this report to amend both the EC Treaty and the Agreement on Social Policy.

In the framework of the research project, in January 1996 a small working conference was organized in which various experts, conversant with the problems under discussion, took part. The aim of this conference was to find out whether support could be mustered in the Netherlands for such proposals as drafted by the research team. Recommendations that came forward during this conference have been taken included in the final drafting of this report.

The vision set forth in this report regarding the status of women in European society depart on a Dutch perspective. First, an outline is given of the present state of affairs with regard to equal treatment policies in the European Community. Subsequently, a number of legal proposals are offered, which researchers think would contribute to improving the status of women. These proposals have been drafted as much as possible in conformity with the current terminology used in the EC Treaty. In addition, a number of suggestions are made for the further development and the implementation of the proposals. Finally, a view of the future status of women in European society is presented.

In May 1996, a conference attended by experts and interested parties from various Member States of the European Community took place. Both the members of the Equal Opportunity Unit and the members of the Committee on Women's Rights of the European Parliament spoke at the conference. The representatives of the European Parliament in particular were very supportive of the proposals as laid down in this report.⁶¹ An English compilation based on the ideas and opinions brought forward by both speakers and other experts during the conference, will be published in the near future.

The research team wishes to thank all those who have supported the publication of this report. Furthermore we wish to thank Ms. Nettie Litjens and Ms. Bregtje Schwenke for their secretarial assistance.

⁶¹ The speakers at the conference were: Mrs. A. Hubert, Mr. L. Flynn, Mrs. J. Shaw, Mrs. P. Conroy, Ms. E. Franssen, Ms. M. Meertens, Mrs. A. Van Lancker, Mrs. T. Hervey, Mr. R. Blanpain, Mrs. C. Wetzels and Mr. J. Wouters.

Chapter 1

The present state of affairs in the field of equal treatment of women and men in the European Community.

1.1 Introduction

In this part of the report, an inventory is made of the various activities that have been developed by the Community in the field of equal treatment of women and men. From this inventory, certain *lacunae* will be readily identified and subsequently these gaps can serve as a basis for different proposals to amend the EC Treaty or existing Directives. First, an overview of the Community's equal treatment policy will be given. Subsequently a number of fields are discussed, where there seems to be a need for improvement. These fields are the principle of equal treatment of women and men in general, equal treatment of women and men at work and in care tasks. In turn, these different areas are then subdivided into different, more specific subjects.

1.2 Community Policy

Article 119 is the only Article in the EC Treaty that prescribes that women and men are to be treated equally. This equal treatment, however, is limited to equal pay for equal work. The case law of the European Court of Justice offers an extensive interpretation of both notions pay and work. Building on Article 119 of the EC Treaty, various Directives and action programmes have been adopted. Both the most important Directives and the action programmes will be discussed below. Furthermore, due attention is given to the Social Protocol and the Agreement on Social Policy, both adopted in 1991. Finally, something is said on the concept of 'subsidiarity'. The most important case law with regard to Article 119 of the EC Treaty is discussed in paragraphs 1.3 to 1.5.

1.2.1 Directives⁶²

The first Directive, which entered into force in 1975⁶³, regulates equal pay for women and men. Any distinction according to sex is forbidden with regard to all aspects of remuneration of equal work or of work to which equal value is attributed. The problem as to whether the different kinds of jobs women and men perform, are comparable is solved by a provision in the Directive prescribing a system of job classification schemes, as the basis for fixing the actual remuneration. Such schemes must be based on the same criteria for women and men, and must have been designed so as to exclude all possibilities of sex discrimination. The Directive prescribes the development of procedures that allow employees to pursue their claims by judicial process in case of non-equality of payment.⁶⁴

The second Directive of 1976⁶⁵ deals with equal treatment of women and men as regards access to employment, vocational training, promotion and working conditions. The Directive aims at combatting

⁶² See for information on directives of the European Community: S. Prechal, *Directives in European Community Law; a study on the EC-directives and their enforcement by national courts*, Oxford University Press, (1995).

⁶³ Directive 75/117/EEC Equal Pay Directive (OJ 1975 L45/198), 19-2-75.

⁶⁴ See for information on the first Directive: J. Currall, Article 119, in: *Kommentar zum EWG-Vertrag*, loc. cit., p. 3415.

⁶⁵ Directive 76/207/EEC Equal treatment Directive (OJ 1976 L39/40), 12-2-76

both direct and indirect discrimination: "The equal-treatment principle forbids any discrimination on grounds of sex either directly or indirectly by reference in particular to marital status or family status." (Article 2, paragraph 1). Exceptions to the principle of equal treatment are permitted by the Directive, namely when the sex of the employee constitutes a determining factor of the occupational activity or provisions concerning the protection of women, particularly as regards pregnancy and maternity (Article 2, paragraph 3). The Directive also allows for measures of positive action, especially if designed to redress existing inequalities between women and men (Article 2, paragraph 4)⁶⁶.

The third Directive of 1978⁶⁷ regulates the adaptation of existing statutory social security legislation to the principle of equal treatment of women and men. This Directive is applicable to legal measures that deal with sickness, invalidity, old age, accidents at work, occupational diseases, and unemployment, and only covers the working population, including the self-employed and those who are seeking employment. Social security is included in the Directive in those cases in which it either supplements or replaces the above-mentioned measures. The Directive does not apply to the various schemes of family benefits, child allowances or the determination of pensionable ages.⁶⁸

The fourth Directive of 1986⁶⁹ is concerned with equal treatment of women and men in occupational social security schemes. It deals especially with schemes that provide benefits supplementing those provided by statutory social security schemes. These schemes are set up by the employers and employees themselves by mutual consent. In the Netherlands, for example, this applies to the *Algemeen Burgelijk Pensioenfonds* (Dutch State Employees' Pension Scheme) and company or sector pension funds. The fourth Directive is applicable to all categories of employees and self-employed persons, including the unemployed, the sick, invalid or retired employees. In admitting persons to their social security scheme or in determining pensionable age, companies, pension funds and collective labour contracts must not discriminate on the grounds of sex. The Directive does not put an end to the situation that women generally can not accrue the same pension rights as men.⁷⁰ More frequently than men women are employed under flexible contracts. These contracts often offer less favourable terms of employment with regard to pensions than standard contracts.⁷¹

The fifth Directive, which came into force in 1986⁷², deals with equal treatment of self-employed persons and of spouses working in family businesses. The Directive contains general stipulations prohibiting the discrimination against women, when founding or expanding a family business between spouses as well as in various other activities of the self-employed. In the field of social security, the

⁶⁶ See for information about the second Directive: J. Currall, artikel 119, in: *Kommentar zum EWG-Vertrag*, loc. cit., p. 3473.

⁶⁷ Directive 79/7/EEC on Equal Treatment in Matters of Social Security (OJ 1979 L6/24), 10-1-79.

⁶⁸ See for information on the third Directive: J. Currall, Article 119, in: *Kommentar zum EWG-Vertrag*, loc. cit., p. 3477.

⁶⁹ Directive 86/613/EEC on Equal Treatment for the Self-employed (OJ 1986) L225/40, 12-8-86.

⁷⁰ In this report the term "flexible contracts" means: all labour contracts not falling within the category of the 36- or 40-hour working week and contracts of indeterminate duration. In this context, we may think of, among others, part-time contracts, outworking, minimum/maximum contracts, contracts for a definite period of time and zero-hour contracts. Admittedly, in the European Community the term "atypical labour" is referred to, but this implies that atypical work does not satisfy the "male" standard of typical work, and thus the male norm is taken as the standard norm. The OECD report in this context speaks of "non-standard forms of employment", OECD report 'Shaping Structural Change, the role of women', loc. cit., p. 31.

⁷¹ See for information on the fourth Directive: J. Currall, Article 119, in: *Kommentar zum EWG-Vertrag*, loc. cit., p. 3482.

⁷² Directive 86/613/EEC on Equal Treatment for the Self-Employed (OJ 1986 L359/56), 19-12-86.

Directive provides for the possibility of spouses in joint-ventures to insure themselves against, among others, sickness. It does not, however, provide for social benefits or substitution during pregnancy: the Member States are only required to examine the various possibilities to that effect.

The sixth Directive of 1992⁷³ regulates the protection of women during pregnancy.⁷⁴ It provides, among other things, for a minimum maternity leave and requires employers to adjust working conditions, if the work implies specific risks to pregnant women. The Directive is expressly based on Article 118a of the Treaty. The Directive, in contrast to former equal treatment Directives, is only meant to provide a minimum standard. Article 12 of the Directive provides for the establishment of a complaints procedure. The view of the European Parliament is, that access to the national court should be accompanied by a reversal of the burden of proof.⁷⁵

Besides the above-mentioned Directives, there have been various other draft directives which were not adopted by the Council. They will be dealt within the course of the discussion of the various topics below.

1.2.2. Action Programmes

Apart from directives, also a number of action programmes have been established. The first action programme (1982-1985)⁷⁶ was the most elaborate; it covered about 15 aspects that were felt to be in need of improvement. For example: supervision of the implementation of the various Directives, equal treatment in the social security sector, paternity and maternity leave, positive action, putting an end to occupational segregation and distributing work and family responsibilities equally.

In contrast to the first action programme, the second (1986-1990)⁷⁷ covers far less subjects. The first programme had shown that covering too wide a field had led to the problem of very little being achieved. The eight subjects covered by the second action programme are improved implementation of existing measures, education and training, job creation, new technologies, social protection and social security, sharing the responsibilities at home and at work, changing the prevailing mentality and last but not least improving deliberation and decision-making at Community level.

In the third action programme (1991-1995)⁷⁸, it was established that great inequalities between

⁷³ Directive 92/85/EEC on the protection of the health and safety of pregnant and breastfeeding workers (OJ 1992 L348/1), 28-11-92.

⁷⁴ See also: Proposal for a Council Directive regarding the protection at work of pregnant and breastfeeding women, OJ C 281 of 9 November 1990; H. Schneider, *Zwangerschapsverlof-ouderschapsverlof-kinderopvang: geen gemakkelijke bevalling!* In: A.W. Heringa, J. Hes and L.Lijnzaad, *Het Vrouwenverdrag: een beeld van een verdrag...* Antwerpen-Apeldoorn, MAKLU Uitgevers (1994); W. Elzinga and S. Prechal, 'ouderschapsverlof: een zware bevalling?', *Nemesis* 1985/86, 53 (55-...); E. Ruinaard, The reconciliation of family and work responsibilities, a legal approach, LL.M. Thesis Academic Year 1991/1992. EUI Florence, p.44; M. Saurel-Cubizolle, P. Romito, J. Garcia, 'Description of maternity rights for working women in France, Italy and the UK', *European Journal of Public Health* 1993, vol. 3, no. 1; European Parliament, Investigation Committee on the position of women in Europe, Subject no. 14 of the report of the inquiry: Motherhood, parental leave and basic provisions for Toddlers, 5 July 1993, EP 86.199/fin./annex, p.424 and following; See V. Cromack, 'The EC Pregnancy Directive - principle or pragmatism?', *The Journal of Social Welfare & Family Law*, 1993, p.261 ff.; E. Ellis, 'Protection of pregnancy and maternity- the pregnancy directive', *Industrial Law Journal* 1993, 63 ff.; E. Caracciolo di Torella, 'Towards a fundamental right to pregnancy and maternity in the European Union?', paper written for the conference "A world in transition, feminist perspectives on international relations", held in Lund on 14-16 June 1996.

⁷⁵ OJ C 150/102, Amendment no. 15.

⁷⁶ First action programme 1982-1985, COM(81) 758 fin.

⁷⁷ Second action programme, 1986-1990, Brussels, 19-12-1985, supplement no. 23 to the magazine "Vrouwen van Europa".

⁷⁸ Third action programme, 1991-1995, COM(90) 449 fin.

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women and men still existed in the labour market, namely:

- Women were employed under flexible contracts more frequently than men. These contracts have the advantage that they offer the necessary freedom for both employers and employees, but a disadvantage is the fact that the secondary terms of employment are usually worse than in standard contracts.
- Women were over represented in certain sectors, such as education, health care and administrative work. Especially the first two sectors were frequently affected by spending cuts.
- In many Member States, there was still a large difference between the remuneration paid to women and men for the same type of work.
- Both in public service and in private firms women often occupied the lowest positions and consequently received the low salaries that come with these jobs.
- Women often encountered problems because their working hours did not correspond to the school hours of their children and often there were not enough day-care centers. In addition to that the quality of these day-care centers was far from ideal.⁷⁹

To redeem this situation, the following action points were identified: equal treatment and equal pay for women and men at work, accelerated integration of women in the labour market, improvement of the status of women in society through information and campaigning for more awareness, further development of measures on these subjects and better integration of women in the labour market. In a resolution, the Commission invited Member States to take measures to achieve the goals of the third action programme.⁸⁰

The fourth action programme (1996-2000)⁸¹ focuses on the redistribution of paid and unpaid work, accelerated participation of women in decision-making and the abolition of segregation in the labour market. The first action programme aims to do away with those barriers that prevent women from exercising their full rights to citizenship with the corresponding political, economic, social and cultural rights.⁸² For the realization of these goals, the following activities are relevant:

1. Equal pay and equal treatment of part-time and full-time employees; a directive must be proposed stipulating the right to part-time work as well as a directive that lays down the rights of employees with flexible contracts.
2. Unpaid, voluntary work in the private domain usually done by women must be made more accessible and more attractive for men by means of measures pertaining maternity and paternity leave and leave in case of calamities.
3. A directive must be adopted prohibiting discrimination on the grounds of age.

1.2.3. The Social Protocol and the Agreement on Social Policy

In 1989, a Community Charter of Fundamental Social Rights of Workers was signed by the eleven Member States of the European Community. It is a solemn, legally non-binding declaration laying

⁷⁹ Social Europe 3/91, 'Equal opportunities for women and men', Office for Official Publications of the EC, Luxembourg 1992, pp. 15-16.

⁸⁰ Council Resolution 91/C 142/01 of 21 May 1991, regarding the third medium-term action programme on Equal Opportunities for Women and Men OJ C 142/1 of 31 May 1991.

⁸¹ Proposal for a Council Decision regarding the fourth medium term action programme on Equal Opportunities for Women and Men (1996-2000), COM (95) 381 final, 95/0206 (CNS), Brussels 19-7-1995.

⁸² Draft Recommendation of the Committee on Women's Rights to the Commission Institutional affairs, regarding the evaluation of the work of the reflection group and the establishment of political priorities of the European Parliament for the Intergovernmental Conference, DOC-NZ/PA/283/283236, EP 214.931, 10 January 1996, Rapporteur: Anne van Lancker, p. 3. In this draft advice it was stated, among other things, that the legal basis for the fourth action programme is Article 235 of the EC Treaty and attention is drawn to the desirability of an adequate legal basis in the EC treaty for equality between women and men.

down the main principles upon which labour legislation in the European societies is built.⁸³ The Member States that are parties to the Social Charter, wish to continue in the direction they had set out by adopting this Charter. The original intention of the Member States was to amend the whole chapter of the EC Treaty devoted to social affairs (Articles 117-122) in the context of the "new European Social Policy". Amongst other things they wanted to add to the list of cases, in which decisions by the Council can be taken by qualified majority. The United Kingdom, however, objected vehemently. As a result, the other Member States decided that the change in the EC Treaty in the field of social policy which they wanted to implement, should be incorporated in an Agreement to be attached to the EC Treaty in the form of a Protocol.⁸⁴ The eleven (now fourteen) Member States are therefore bound by this Agreement as they are bound to the terms of the EC Treaty, with exception of the United Kingdom.⁸⁵

What are the differences between the Agreement on Social Policy and the EC Treaty?

Article 1 of the Agreement amends Article 117 of the EC Treaty. Article 117 obliges the Member States to promote the improvement of working conditions in order to achieve harmonization. According to Article 1 of the Agreement Member States are obliged to make the promotion of employment and the improvement of living standards their objective. This allows for a broad interpretation, as harmonization is no longer the objective.

Article 2 of the Agreement is also a modification of Article 117 of the EC Treaty. For this Article uses the word "Community" instead of just "Member States" as in Article 117 of the EC Treaty. Using this word could imply that competence in this field is given to the Community, which would mean a further limitation of the sovereignty of the Member States⁸⁶. Furthermore, Article 2 of the Agreement constitutes a modification of the Articles 118 and 118a of the EC Treaty. Under the Agreement the areas in which the Community is allowed to act are broader than they are in the EC Treaty. The Agreement offers the possibility of taking measures concerning working conditions, a possibility which is not found in Articles 118 and 118a of the EC Treaty. The full range of the powers granted by Articles 118 and 118a is not yet clearly determined by the Court.⁸⁷ Given the narrow interrelation of these articles and the articles of the Agreement, the precise extent of the competence granted in Article 2 is therefore also unclear. It is of fundamental importance to know whether the subjects mentioned in the Article are an exhaustive enumeration or whether they are only examples of subjects that need to be given priority in the attainment of the goals laid down in Article 1. Finally, Article 2 of the Agreement seems to set Article 100a paragraph 2 of the EC Treaty aside by requiring only a qualified majority, whereas Article 100a paragraph 2 requires unanimity for decisions concerning the rights and interests of the employees.⁸⁸ This means that, probably, more social policy measures will be taken on the basis of the Agreement. Increasing the number of cases in which only a qualified majority

⁸³ Community Charter of Fundamental Social Rights of Workers, Luxembourg, Bureau voor Officiële Publicaties der Europese Gemeenschappen, 1990.

⁸⁴ P. Watson, 'Social policy after Maastricht', In: Common Market Law Review 30, 1993, p. 486.

⁸⁵ See for information on the Agreement on Social Policy: J. Currall, Article 119, in: *Kommentar zum EWG-Vertrag*, loc. cit., p. 3484.

⁸⁶ E. Szyszczak, 'Social Policy: A happy ending or a reworking of the fairy tale?' in: D. O'Keeffe en Twomey, *Legal Issues of the Maastricht Treaty*, London, Wiley Chancery Law (1994) p. 315.

⁸⁷ See for more information for instance: case C-286/85, Court of Justice, 24 March 1987 (*McDermott and Cotter I*).

⁸⁸ E. Szyszczak, 'Social Policy: A happy ending or a reworking of the fairy tale?' loc. cit., p. 317.

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is required will of course only be effective in so far as the Council members are willing to proceed to a vote. The European Parliament and the Economic and Social Committee have expressed their sharp disapproval of the Council's habit of continuing to seek unanimity, even for subjects where only a qualified majority is required.⁸⁹

Article 6 paragraph 3 of the Agreement stipulates that Member States are entitled to take positive action as a means of facilitating the pursuit of a profession by women or to prevent or compensate the disadvantages that might occur in the professional careers of women. Article 119 of the EC Treaty does not have a provision for positive action, but Article 2 paragraph 4 of the second Directive allows Member States to take measures in order to promote equal treatment of women and men, especially by eliminating existing inequalities. The provision is restrictively interpreted by the European Court of Justice: every positive action measure has to be of a specific nature and may only be applied in situations where women actually suffer disadvantages compared to men.⁹⁰ This means that Article 6 of the Agreement is broader and offers more possibilities for positive action than the second Directive.

1.2.4. Subsidiarity

When trying to improve the status of women in the European Community through legislation, sooner or later, one is bound to run into the concept of subsidiarity. The principle of subsidiarity, as formulated in Article 3b of the EC Treaty, requires the Community to use its competences if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.⁹¹ The principle compels the Community to analyze the "value added" by Community action as compared to action at national level. The Maastricht Treaty puts the subsidiarity principle in a prominent place (Article A, paragraph 2 and Article B, last section). This is due to the unease that some Member States feel about the loss of national powers as a consequence of the generous interpretation of Community competences. The Community's competences are usually not given in specific policy fields, such as public health or consumer protection, but are linked functionally to the specific goals of integration, such as the realization of the single market.⁹² If the principle of subsidiarity is applicable, no Community action can be taken. The question is whether the subsidiarity principle applies to the social policy clauses of the EC Treaty. Watson states that this is not the case. Social policy legislation is based, among others, on the Articles 100 and 235 of the EC Treaty. Measures necessary to establish the single market or to facilitate its functioning are taken on the basis of these articles. This implies that social policy is a necessary element of the establishment and functioning of a single market. The establishment of a single market is an outstanding example of a policy area to which the subsidiarity principle does not apply, or in other words: it is a policy field for which Community action is imperative. Community action is therefore also required with regard to social policy and, consequently, the principle of subsidiarity is not applicable.⁹³

Existing case law is also based on the presumption that the Community has a general competence in

⁸⁹ W. Devroe and J. Wouters, *De Europese Unie; Het Verdrag van Maastricht en zijn uitvoering: analyse en perspectieven*, Leuven, Peeters (1996) p. 465.

⁹⁰ Case C-318/86, Court of Justice 30 June 1988 (Commission - France) and Case C-111/86, Court of Justice 16 December 1987 (Delauche - Commission EC).

⁹¹ See on this: P. Kapteyn, 'Community Law and the Principle of Subsidiarity', *Revue des Affaires Europeennes*, nr. 2, 1991, p.35.

⁹² R. Lauwaars and C. Timmermans, *Europees Gemeenschapsrecht in kort bestek*, Wolters-Noordhoff, Groningen, 1994, pp. 40-41.

⁹³ P. Watson, *Social Policy after Maastricht*, loc.cit., p. 496.

the area of social policy.⁹⁴ Article C of the Treaty on European Union also provides that the Union will ensure consistency and continuity of its actions aimed at the realization of its goals while simultaneously protecting and developing the "*Acquis Communautaire*" (Article C, first section of the Maastricht Treaty). Boch interprets this provision as giving a general competence in the cases of (un)equal treatment between women and men.⁹⁵

Researchers feel that Community action in the field of the social policy is desirable. For the completion of a single market an active social policy is indispensable. An active social policy confirms and secures the social dimension, which is incompatible with the objectives of Community law. If the Community were to choose to leave social policy more and more to the Member States, this could turn into an instrument to take away the effectiveness of Community measures and could also lead to a deterioration of social legislation in the Member States.⁹⁶ Furthermore, social policy measures at Community level are desirable to make clear to future Member States which components the Community considers as fundamental for a social legal order.

Especially in the area of equal treatment of women and men, legislation at Community level is to be recommended. It is risky to leave the interpretation and elaboration of such regulations entirely to the European Court of Justice. Lately, we experience the Court steering a more conservative course in its judgements, for example with regard to part-time work and positive action.⁹⁷ In other words: sometimes the European Court is progressive, on occasions it is more conservative. This creates much legal uncertainty for the Member States and their citizens. To prevent such legal uncertainty, it is necessary to regulate the subjects listed below at Community level. It is also important that certain concepts receive uniform interpretation. From the report on the Third Community action programme, it emerges that the term 'indirect discrimination' is defined and applied in a vastly different way in Community law than in national law. This leads to confusion and legal uncertainty.

1.3. The Principle of Equal Treatment of Women and Men

1.3.1. Equal Treatment in General

Article F paragraph 2 of the Maastricht Treaty stipulates that the Union shall respect fundamental human rights as guaranteed in the European Convention on Human Rights (ECHR). The ECHR does not contain a principle of equal treatment of women and men, but it does have a non-discrimination clause, namely Article 14 ECHR. The protection of fundamental human rights in a Community context rests with the Court of Justice of the Union and not with European Court of Human Rights. This was decided by the European Commission on Human Rights.⁹⁸ However, neither the principle of equal treatment of women and men nor the principle of non-discrimination form part of primary Community legislation.

⁹⁴ Case C-43/75, Court of Justice 8 April 1976, (Defrenne II).

⁹⁵ C. Boch, 'the European Community and sex equality: Why and how?' in: *Sex Equality; law and economics, Hume papers on public policy*, vol. 1, no. 1, Spring 1993, p. 58.

⁹⁶ N. Burrows, 'The future for sex equality in the EC', in: *Sex Equality; Law and economics, Hume papers on public policy*, vol. 1, no. 1, Spring 1994, p. 58.

⁹⁷ See the Cases C-399/92, Court of Justice 15 December 1994, (Helmig-Stadt Lengerig) and C-297/93, Court of Justice 13 December 1994 (Grau-Hupka) about part-time work and the Case C450/93, Court of Justice 17 October 1995 (Kalanke-Freie Hansestadt Bremen) about positive action.

⁹⁸ Decision regarding the admissibility of petition no. 13258/87 of M & Co against the Federal Republic of Germany, European Commission of Human Rights, 9 February 1990.

It has been established in case law that the equal treatment principle forms part of the legal order of the Community.⁹⁹ In chapter 2 we will pursue this matter further. Below a number of subjects will be discussed, which are still felt to constitute bottle necks with regard to the equal treatment of women and men, namely direct discrimination, indirect discrimination and the burden of proof.

1.3.2. Direct Discrimination

Direct discrimination implies direct differentiation in treatment on the grounds of sex¹⁰⁰ and is prohibited by Article 2, paragraph 1 of the Second Directive. Certain qualities such as pregnancy, child birth and maternity are inextricably linked to sex. The Court has confirmed that discrimination on the grounds of pregnancy is tantamount to sex discrimination.¹⁰¹ Thus, in the Webb case it was stated that pregnancy is not equivalent to illness, which meant that the male standard equating pregnancy with an illness was abandoned. In the light of a substantive equality approach to equal treatment, firing a woman because she is pregnant is the equivalent of firing a woman because she is a woman, as only women can become pregnant.¹⁰² In this case, the employer put forward that an enterprise had the right to demand from its employees that they be available, so as to be able to compete successfully against other enterprises. Women who became pregnant could not fulfill the requirement of availability; this constituted a valid reason for employees not to employ them or to fire them. The Court rejected this argument, on the grounds that the period of non-availability for reasons of pregnancy was comparatively insignificant in relation to the total duration of the employment contract (the woman in question had a contract of employment for an indefinite period). The Court therefore rejected the formal equality approach that all employees, male or female, who could not fulfill the availability criterion, could be fired.

The Second Directive offers three grounds for making an exception to the principle of non-discrimination. First of all, difference in access to those occupational activities, including training, for which, the sex of the worker constitutes a determining factor by reason of their nature or the context in which they are carried out.¹⁰³ Secondly, differences in treatment aiming to protect women. And finally, the third exception relates to measures designed to redress existing inequalities between women and men by giving women a privileged position.

1.3.3. Indirect Discrimination

The Second Directive¹⁰⁴ stipulates that discrimination also includes indirect discrimination. The Directive does not give a definition of indirect discrimination, but in Article 2, paragraph 1, it refers to marital and family status. By indirect discrimination the following is meant: discrimination grounds

⁹⁹ See the "joined" cases 75/82 and 117/82, European Court of Justice of 20 March 1982 (*Razzouk-Commission*).

¹⁰⁰ The terms "distinction" and "discrimination" are interchangeable. The Court uses both terms indifferently as regards content.

¹⁰¹ Among others in the Cases C-177/88, Court of Justice 8 November 1990, (*Dekker-VJV-Centrum Plus*) and C-32/93, (1994) ECR I-3567 (*Webb-EMO Air Cargo (UK) Ltd.*).

¹⁰² H. Fenwick and T.K. Hervey, 'Sex equality in the single market: new directions for the European Court of Justice', in: Common Market Law Review 32, no. 2 April 1995, p. 451.

¹⁰³ These positions have been exhaustively listed in Dutch statutes and General Administrative Orders, namely in article 5, paragraph 3, Dutch Equal Treatment Act (WGB) and Order of 19 May 1989, Stbl. 1987, 207.

¹⁰⁴ Council Directive 76/207/EEC, 9 February 1976, OJ L 39/40, 12-2-76.

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other than sex, that affects more women than men.¹⁰⁵ For example, the situation of part-time workers compared to that of full-time workers. When a distinction is made between part-time workers and full-time workers and this has a negative effect on part-time workers, this could be a case of indirect discrimination, as more women work than men part-time¹⁰⁶. Another example of indirect discrimination is discrimination on the grounds of age.

What is the meaning of the term indirect discrimination in Community law? There are various judgements of the Court which deal with the question of whether indirect discrimination is Community law and if so, the criteria which have to be met to be able to speak of indirect discrimination.

In *Defrenne II*¹⁰⁷, the Court considered:

"...Directive no. 75/117...was intended to encourage the proper implementation of Article 119 by means of a series of measures to be taken on the national level, in order, in particular, to eliminate indirect forms of discrimination..."

Although neither Article 119 nor the First Directive mentions the words 'indirect discrimination', the Court, decided, that the principle of equal treatment also implies the prohibition against indirect discrimination.

In *Jenkins*¹⁰⁸, the Court came to the following conclusion:

"A difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that the group of workers is composed exclusively or predominantly of women."

Whereas in the *Defrenne II* case it is recognized that indirect discrimination is a form of discrimination, prohibited by Community law, in *Jenkins* it is decided that the unequal pay of part-time and full-time workers is discriminatory, because part-time workers are mainly women.

In the *Bilka* case¹⁰⁹, the Court elaborates on indirect discrimination and its criteria. The Court defines indirect discrimination as follows: Using a gender-neutral criteria that affects a far greater number of women than men, is discriminatory, unless it can be shown that it is based on objectively justified factors unrelated to any discrimination on grounds of sex. The question that arises, is there a case of objective justification? The Court decided that if an employer can prove that the measures chosen by him correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, one can speak of objective justification.

1.3.4 Burden of Proof

¹⁰⁵ See for information on indirect discrimination: J. Currall, Article 119, in *Kommentar zum EWG-Vertrag*, Groeben, Thiesing, Ehlermann, Nomos Verlagsgesellschaft, Baden Baden, 1991, p. 3435.

¹⁰⁶ R. Holtmaat and T. Loenen, *Inleiding vrouw en recht*, Alphen aan de Rijn, Samson H.D. Tjeenk Willink, 1989, p. 25.

¹⁰⁷ Case C-43/75, Court of Justice, 8 April 1976, (*Defrenne-Sabena*).

¹⁰⁸ Case C-96/80, Court of Justice, 31 March 1981, (*Jenkins-Kingsgate*).

¹⁰⁹ Case C-170/84, Court of Justice, 13 May 1986, (*Bilka/Kaufhaus-Weber von Hartz*).

In practice, it is often difficult to prove indirect discrimination, because the burden of proof¹¹⁰ lies with the employee, whereas the pieces of evidence are in the hands of the employer. Reversal of the current distribution of the onus of proof seems an obvious course to take. In the *Bilka* case¹¹¹, the European Court of Justice came up with a formula to this effect. This formula has been codified in the draft Directive on reversal of the burden of proof.¹¹² Article 3, paragraph 1 reads:

"Member States shall ensure that, where persons who consider themselves wronged by failure to apply to them the principle of equality establish at any stage of proceedings before a court or other competent authority, as the case may be, a presumption of discrimination, it shall be for the respondent to prove that there has been no contravention of the principle of equality. The complainant shall have the benefit of any doubt that remains."

So far, the Council has refused to adopt the proposed Directive on the reversal of the burden of proof. The Commission has therefore decided to use the Agreement on Social Policy for the realization of reversal of the burden of proof in equal treatment cases and will be sending a document to social partners on the subject.¹¹³

In *Enderby*, the Court extended the criteria formulated in *Bilka*. On the basis of this ruling, a presumption of indirect discrimination exists as soon as a seemingly neutral criterion for differential treatment has the effect of actually disadvantaging more women than men. The plaintiff has to submit evidence, that, if not refuted successfully, gives sufficient ground to assume discrimination. Where there is a *prima-facie* case of discrimination, it is for the employer to prove that there are one or more objective reasons for the difference in treatment, not related to discrimination on the grounds of sex. An objective justification is accepted by the Court, if the employer can prove that the measures correspond to a real need on the part of the firm, are appropriate with a view to achieving the objectives pursued, are necessary to that end, and have been consistently applied. Where the Court establishes that an objective factor justifies a certain part of the inequality, this specific part is justified. If the Court cannot establish that such is the case, it will have to assess whether the factors brought forward as justification, are sufficiently significant to explain the difference in treatment in whole or in part.¹¹⁴

There are different methods for comparing pay in order to ascertain whether there has been a case of discrimination. In some cases, for example by direct sex differentiation due to the text of the measures themselves, an abstract comparison is made. In other cases, the comparison is empirical. Where a certain rule negatively affects more women than men this is a *prima-facie* evidence of an indirect link between the measure and sex.¹¹⁵ The Court's interpretation of Article 119 of the EC Treaty shows that, depending on the circumstances, in some cases an abstract comparison of the pay is made¹¹⁶, on

¹¹⁰ See on the burden of proof: C. Currall, Article 119, in: *Kommentar zum EWG-Vertrag*, loc. cit., pp. 3438-3439.

¹¹¹ Case C-170/84, Court of Justice 13 May 1986, (*Bilka-Weber*).

¹¹² Proposal 88/C 176/09, for a Council Directive regarding the burden of proof in the field of equal pay and equal treatment of women and men. COM(88) 269 fin., OJ C 176/5, 5-7-1988.

¹¹³ Report on the Community Charter of the Fundamental Social Rights of Workers and on the Protocol on Social Policy annexed to the Treaty establishing the European Union. COM(95) 184 def., Brussels, 24-5-1995, p. 20.

¹¹⁴ As stated by the Court in case C-127/92, Court of Justice, 27 October 1993 (*Enderby-Frenchay Health Authority*), as well as in RN 1993, 354.

¹¹⁵ A.G. Veldman, *Effectuering van sociaal-economisch recht volgens de chaostheorie*, Zwolle, Tjeenk-Willink, 1995, p. 246.

¹¹⁶ Case C-262/88, Court of Justice, 17 May 1990, (*Barber-Guardian*).

other occasions an empirical group comparison is made¹¹⁷, or even a comparison based on pairs¹¹⁸. A comparison in pairs is done by comparing a male and a female employee within the same firm or service, doing work of approximately equal value. In view of Article 119 of the EC Treaty, a comparison in pairs must be an empirical one. An abstract comparison is made, when the pay measure is evidently directly discriminatory and also in some cases when it is clear that a pay measure is indirectly discriminatory¹¹⁹.

1.4. Equal Treatment of Women and Men at Work

1.4.1. General Considerations

Although progress has been made during the last few decades in the equal treatment of women and men at work, there is still ample room for improvement:

With regard to the employment of women, intensification of Community policies is still badly needed. All the men between the ages of 20 and 60, 81% are employed and 12% are out of work. The remaining 7% are not engaged in salaried employment.¹²⁰ Of all the women between the age of 20 and 60, 56% are employed and 37% are unemployed. Again, the other 7% are not engaged in salaried employment.¹²¹ In other words, the number of unemployed women in the EC is three times that of unemployed men.¹²² Of all the persons people who are not engaged in salaried employment for personal or family reasons, 97.3% is female. This means that virtually only women do not participate in the labour market for personal or family reasons. Of the persons not engaged in salaried employment, because they have given up hope of ever finding employment, 75% are women.¹²³ It does not seem that the situation is going to improve much in the near future, in as much as, in most Member States, the accent of interest is shifting from integrating the unemployed in general towards reintegrating welfare recipients. In the future, priority will be given to reintegrating the poorly qualified unemployed receiving welfare, over integrating the economically 'inactive' without income. As this last category mainly consists of women, either reentering the labour market or long-time unemployed, the danger exists that the labour market perspectives will deteriorate further due to this reassessment of priorities within the Member States. Furthermore, one can observe that the battle against unemployment in most Member States leads to expenditure cuts in the public sector and a growing emphasis on reduction of labour costs. This will have quite seriously affects women¹²⁴, for employment opportunities for women tend to be concentrated in the public sector of the economy. Cost reductions are needed to reinforce the fundamentals of the economy. Reinforcing the basis of the economy, however, presupposes that all citizens, men as well as women, are offered opportunities to participate in the labour market. When taking measures to curtail expenditure, however necessary to

¹¹⁷ Case C-109/88, Court of Justice, 17 October 1989 (*Danfoss*).

¹¹⁸ Case C-129/79, Court of Justice, 27 March 1980 (*Macarthys-Smith*).

¹¹⁹ A.G. Veldman, *Effectueren van sociaal-economisch recht volgens de chaostheorie*, loc. cit., p. 247.

¹²⁰ "Economically non-active" is here interpreted as individuals who are retired, follow studies, or are disabled and women and men who take care of the household and the children.

¹²¹ These figures are averages over twelve Member States of the European Union.

¹²² Women and Men in the European Union: A Statistical Portrait, Luxembourg, Office for official publications of the European Community, 1995, p. 123.

¹²³ Women and Men in the European Union: A Statistical Portrait, loc. cit., p.135.

¹²⁴ *Naar een Europees sociaal beleid*, Advies Groenboek sociaal beleid van de Emancipatieraad, Den Haag, 14 April 1994, adv.nr. ER-94/16, p. 18.

fight unemployment, we must see to it that the anticipated positive and negative effects discussed above do not affect specific groups.¹²⁵

The White Paper offers a number of possibilities to intensify Community policy in the field of female employment:

- elimination of all those potential discriminatory aspects in fiscal and social security policies that could constitute an impediment to the equal participation of women in the official labour market;
- improvement of existing career possibilities for women, which will lead to a demand for services and technical assistance, such as child care and vocational training;
- the realization of schemes for the payment of taxes and social security that are geared to both women and men who are looking for work and seek to combine work and family responsibilities.¹²⁶

Apart from the fact, that more women than men are unemployed, feminization of certain professions and employment contracts is taking place.¹²⁷ In certain sectors, comparatively more women than men are represented, for example, the cleaning sector and administrative work.¹²⁸ They are characterized by low status, low financial appreciation, and limited possibilities to obtain new skills, promotion (vertical mobility), and training.¹²⁹ There is still a great difference in the pay of women and men; variations relate solely to the extent of these differences. Women are more likely to receive lower or minimum wages than men.¹³⁰ In addition, certain contracts are preferred by women, because they want to be able to combine work and family responsibilities. For example, part-time contracts, outwork or temporary-employment contracts. Of all employees more women (11.9%) than men (9.8) work under temporary-employment contracts.¹³¹ This type of contract has various disadvantages over full-time or virtually full-time contracts entered in for indefinite periods of time.¹³² These disadvantages will be discussed in paragraph 1.4.4.. The low status attributed to these jobs and contracts is not a result of the fact that they are predominantly entered in by women, but of the fact that when women choose certain jobs, it is taken for granted that this type of work can be combined with family responsibilities and therefore cannot be very demanding.

Within the framework of the feminization of certain work, work of equal value and positive action will be discussed below. Part-time work will be discussed in connection with the feminization of certain employment contracts. Finally, something will be said about pensions, because women are often treated unequally in this field.

125 *Naar een emancipatoir Europees beleid*, Advies Groenboek sociaal beleid van de Emancipatieraad, *loc. cit.*, p. 18.

126 Europese Commissie. *Groei, concurrentievermogen, werkgelegenheid, naar de 21e eeuw: wegen en uitdagingen*. Witboek, Luxemburg, 1994, p. 164.

127 In this context, the OECD report speaks of "gender segregation of occupation". OECD report: *Shaping Structural Change, the role of women*, *loc. cit.*, p. 24.

128 This in contrast to the industrial sector, where an average of 21% of the women of the EU are employed (*Women and Men in the European Union: A Statistical Portrait*, *loc. cit.*, p. 140). Even less women have received higher education in technical subjects, namely an average of 15% (*Women and Men in the European Union: A Statistical Portrait*, *loc. cit.*, p. 117). The gender segregation of occupation is intensified, on the one hand, by the overrepresentation of women in certain sectors and, by underrepresentation in other sectors on the other.

129 OECD report: *Shaping Structural Change, the role of women*, *loc. cit.*, p. 24-25.

130 *Women and Men in the European Union: A Statistical Portrait*, *loc. cit.*, p. 137.

131 *Women and Men in the European Union: A Statistical Portrait*, *loc. cit.*, p. 17.

132 In this report we will refer to 'standard contracts'.

1.4.2. Work of Equal Value

Article 119 of the EC Treaty gives expression to the principle of equal pay for equal work. By equal work we mean: work that shows similarities that can be determined by a concrete assessment of work performed by employees of both sexes within the same organization or service.¹³³ It was the First Directive that introduced the term "work of equal value." The Directive, however, does offer a further definition of this term. In 1994 the Commission issued a memorandum in which a further definition of the term "work of equal value" is given.¹³⁴ The memorandum states, that the concept of "equal pay for work of equal value" is to be taken to mean that if a woman performs tasks that are as demanding as those of a man - even if the work is different - she must receive the same pay and benefits unless an objective justification exists for the differentiation. In practice, it is often a matter of different jobs which in terms of effort, responsibility, and professional skill, however, make roughly comparable demands on the workers. Often work done mainly by women is given a lower rating than work done mainly by men. At the present, the Commission is having research conducted on the characteristics of the various systems of remuneration and their influence on the gap between pay received by women and men.¹³⁵

Important instruments for ascertaining whether work is of equal value are the "job classification schemes".¹³⁶ The Court requires the following of job classification schemes:

- the nature of the duties performed, must have been taken into consideration in an objective manner;
- it must be assessed in each individual case whether the job classification scheme as a whole properly considers all aspects of the different jobs in the same establishment.¹³⁷

For the justification of differentiation in job classification schemes it is required:

- "...that those duties by their nature require particular effort or are physically heavy..." and
- "...in order for a job classification system as a whole to be non-discriminatory, it should, however, be established in such a manner that included, if the nature of the tasks in question so permitted, jobs to which equal value was attributed and for which regard it was to have other criteria in relation for workers of each sex may show particular aptitude..."¹³⁸

1.4.3 Positive Action

According to Article 2, paragraph 4 of the Second Directive, Member States may adopt measures to remove existing inequalities in the treatment of women and men. Positive action¹³⁹ is also a concern of the Commission's third action programme on equal opportunities.¹⁴⁰ There are, for example,

¹³³ Stated by the Court of Justice in Case C-129/79, Court of Justice, 27-3-1980, (*MacCarthy-Smith*).

¹³⁴ Memorandum of the Commission regarding equal pay for work of equal value, COM(94) 6 fin., Brussels, 24 June 1994.

¹³⁵ European Parliament, Committee on Women's Rights. Forum on equal pay legislation in the Member States, 23-24 March 1992, EP 156.169.

¹³⁶ See on job classification schemes: J. Curall, Article 119, in *Kommentar zum EWG-Vertrag*, loc.cit., p. 3444

¹³⁷ See on the term "same establishment": J. Curall, Article 119, in *Kommentar zum EWG-Vertrag*, loc.cit., p. 3465.

¹³⁸ Case C-237/85, Court of Justice of 1 July 1986, (*Rummel-Dato*) considerations 13, 15, 16 and 17.

¹³⁹ See also Council Recommendation 84/635 of 13 December 1984 regarding the promotion of positive action in favour of women, OJ L 331/34, 19-12-84 and Report of the Commission on the implementation of the Council recommendation regarding promotion of positive action in favour of women, COM(95) 0247 fin.

¹⁴⁰ The Commission distinguishes six fields of positive action:

- occupational training;

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programmes that encourage women to participate more actively in the labour market (New Opportunities for Women, NOW), to start their own business (Local Employment Initiatives, LEI programme), or to attend vocational training courses (Network of Vocational Training Schemes for Women, IRIS).¹⁴¹ The interim report of the Commission on the third action programme, among other things, evaluates the positive action policies.¹⁴² According to national reports, five countries have approved legislative and administrative measures and collective agreements. Furthermore, the majority of Member States have taken action which predominantly aims at objectively increasing the number of women in staff and policy-making positions.¹⁴³ The upshot of this evaluation was, however, that so far positive action policies failed to lead to the desired results. That is why various new strategic guidelines containing several innovating elements, have been adopted:

- two sectors have been chosen as priority areas. The approach is both more direct and economically orientated;
- it must be demonstrated that positive-action policies are profitable in order to to be accepted by the business community.

As far as the case law of the Court is concerned, however, the future is none too bright. In the *Kalanke* case, the Court rejected absolute and unconditional positive action.

"National rules which guarantee women the absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2, paragraph 4 of the Directive."¹⁴⁴

Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system is a substitution for equality of opportunity as envisaged in Article 2, paragraph 4, the result of which is only to be arrived at by providing such equality of opportunity. The Court is of the opinion that Article 2, paragraph 1, of the Directive gives individual rights to women and men in a concrete situation, and that paragraph 4 is a provision allowing for the creation of equal opportunities in general. In other words, where women and men are equally qualified, Article 2, paragraph 4 does not allow the employer to favour a female candidate only because of her sex.¹⁴⁵ From this we can conclude that applying Article 2, paragraph 4, is not about granting individual subjective rights, that could be enforced upon the employer by the employee. What Article 2, paragraph 4, could contain is what the Recommendation of the Council says on promoting

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- application, recruitment and promotion;
 - adaptation of the work environment, organization of work and working hours;
 - combining professional and family duties;
 - fighting stereotypes; and
 - sexual intimidation.

See on this subject: the work-document of 10 January 1996, *loc. cit.*, p. 4.

¹⁴¹ Social Europe 3/91, Equal opportunities for women and men, *loc.cit.*, pp. 18, 20 and 22.

¹⁴² Commission report on the third Community action programme (1991-1995): Equal opportunities for women and men, Interim report, COM(95) 246 fin., Brussels 13-6-95.

¹⁴³ Report of the Commission on the third action programme (1991-1996), *loc. cit.*, p. 49; work document, of 10 January 1996, *loc. cit.*, p. 7: "All available data that indicate that measures of positive action which apply target figures or quota have a direct and immediate effect on access of women to managerial and policy-making positions."

¹⁴⁴ Case C-450/93, Court of Justice, 15 October 1995, (*Kalanke-Freie Hansestadt Bremen*).

¹⁴⁵ I. van der Steen, "Voorkeursbehandeling of gelijke kansen ?", in *Nederlands Tijdschrift voor Europees Recht*, no. 9, December 1995, p. 275.

positive action for women¹⁴⁶, which is quoted by the Court in the *Kalanke* case. This Recommendation contains a number of suggestions for the creation of a general framework rather than for establishing specific enforceable rights. The *Kalanke* judgement constitutes a breach of the current policy-trend in the Community to improve the present disadvantageous position of women through specific measures. The *Kalanke* decision has raised more questions than it has solved. Van Dijk feels that, because of the vagueness in its finding, the Court, encourages men who have been passed over as a result of positive action, to sue. According to her the legal confusion that has been created, could even have the opposite effect. Firms and institutions, who up to now favoured female candidates in case equal qualifications, might now prefer hiring men instead to avoid getting themselves entangled in long-winded court proceedings.¹⁴⁷ The *Kalanke* case was referred back to the *Bundesarbeitsgericht* in Bremen. The German judge ruled that a national measure found to contravene Community law by the European Court of Justice, was to be declared invalid. This only means that the provision may not be applied. Thus the city of Bremen is allowed to have a positive action policy as such, but it cannot be based on the disputed provision.¹⁴⁸

1.4.4. Part-time Work

In spite of the poor legal status of part-time work, many women work under part-time contracts.

In 1992, 29% of all women on the labour market in the European Community worked part-time, compared to 4% of the total number of working men. Part-time work is mostly chosen by women with children. This phenomenon can be clearly seen in all Member States.¹⁴⁹

A part-time contract is a typical example of contracts often entered into by women, as discussed in paragraph 1.4.1.. Unfortunately, part-time work often falls outside of existing protective labour regulations, is usually excluded from collective labour contracts, offers less social security¹⁵⁰ and an inferior legal status. Other terms of employment also are frequently less favourable than those in full-time work:

- unpaid leave, including parental leave
- no access to vocational training
- easier and cheaper firing procedures¹⁵¹

¹⁴⁶ Recommendation 84/635/EEC of the Council of 13 December 1995, p. 275.

¹⁴⁷ N. van Dijk, 'Schouderophalen over arrest Europees Hof is onterecht'. in Volkskrant 21-10-1995.

¹⁴⁸ *Kalanke gegen Freie Hansestadt Bremen*, 5 March 1996, Erste Senat des Bundesarbeitsgerichts, 1 AZR 590/92 (A), 2 Sa 322/91 Bremen.

¹⁴⁹ Women and Men in the European Union: A Statistical Portrait, *loc. cit.*, p. 137.

¹⁵⁰ In a recent case, the Court of Justice stated:
Artikel 4 Absatz 1 der Richtlinie 79/7 EWG des Rates von 19. Dezember 1978 zur schrittweisen Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen im Bereich der sozialen Sicherheit steht einer nationalen Regelung, die Beschäftigungen mit regelmässig weniger als fünfzehn Stunden in der Woche und einem Arbeitsentgelt, das ein Siebtel der monatlichen Bezugsgrösse nicht übersteigt, von der gesetzlichen Rentenversicherung ausschliesst, nicht entgegen, selbst wenn sie erheblich mehr Frauen als Männer betrifft, da der nationale Gesetzgeber in vertretbarer Weise davon ausgehen konnte, dass die fraglichen Rechtsvorschriften erforderlich waren, um ein sozialpolitisches Ziel zu erreichen, das mit einer Diskriminierung aufgrund des Geschlechts nichts zu tun hat." Case C-317/93, Court of Justice of 14 December 1995, (Nolte-Landversicherungsanstalt Hannover). See for a similar judgement Case C-444/93, Court of Justice of 14 December 1995, (Megner and Scheffel-Innungskrankenkasse Vorderpfalz and Innungskrankenkasse Rheinhessen-Pfalz). Also see: S. Prechal, *Positieve en indirecte sekse-discriminatie*, NJB, 1996, 15 March, edition 11, pp. 406-407.

¹⁵¹ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 33.

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The Commission has made a proposal for a directive designed to harmonize Member States legislation regarding terms of employment in flexible contracts. The Council discussed this proposal on December 6th 1994, but could not reach an agreement.¹⁵² Commissioner Flynn has announced that the subject will now be submitted to the social partners according to the procedure of the Agreement on Social Policy to which eleven Member States are parties. Furthermore, in June 1994, during the annual Conference of the International Labour Organization, ILO Treaty no.175 and the ILO Recommendation no. 182 concerning part-time work were adopted. The ILO Treaty provides, among other things: equal treatment and protection with regard to labour union rights, safety and health, employees' participation rights, equal rights with regard to basic pay and equivalent rights in social security and protection against discrimination. All Member States of the Community are members of the International Labour Organization. With regard to Treaty no. 175, the Commission, mindful of the advice of the European Court, has decided that this Treaty contains elements that are relevant to principles of Community law (equal treatment of women and men and protection of the safety and health of employees). It remains to be seen to what extent the plans of Flynn correspond with this ILO Treaty and how the Community can be prevented from "underbidding" the ILO by adopting less stringent legislation than the ILO Treaty.

With regard to equal treatment of part-time and full-time workers, the Court of Justice, still thinks too much in terms of a formal equality approach. In the *Helmig* case¹⁵³, the Court decided that part-timers are only entitled to a bonus when they exceed normal weekly working hours. According to the Court, 38-40 hours a week constitute "normal" working hours. By using this formal equality approach, the Court protects full-time workers against "unfair" unequal remuneration and applies the standard for full-time workers to those in part-time employment. In its judgement, the Court distinguishes between two types of "time": working time and free time. The Court overlooked another category of "time", however, which is the reason why many part-time workers prefer a "shorter working week": time for the unpaid care of children and/or other members of the family and the time for other occupations and obligations.¹⁵⁴

"To recognize the right of part-time workers to supplementary overtime pay would be to strike a blow at the established structure of the workplace, would have shaken the foundation of the male "gendered" system and would introduce for the first time a recognition of the double burden borne by women and the reasons why they feel forced to take on part-time work."¹⁵⁵

The Court takes a more positive approach in the *Lewark* case.¹⁵⁶ The case was about employees, who received compensation for loss of wages incurred by attending day-release courses offering training, thought to be indispensable for service on the works council. The course lasted seven and a half hours longer than the part-time worker Lewark would normally have spent in paid employment. She did not get reimbursed for these seven and a half hours, though. The compensation allowance was calculated on the basis of the length of her part-time contract. If the duration of the course is longer than the number of hours normally worked in a week, a part-time worker is not entitled to compensation. Full-

¹⁵² Law Network Newsletter 1995, no. 12, V/5513/95 EN, p.1

¹⁵³ Cases C-399/92, C-409/92 and C-78/93, Court of Justice 15 December 1994 (*Stadt Lengericht - Helmig*)

¹⁵⁴ R. Holtmaat, 'Deeltijdwerk, gelijkheid en gender', in *Nemesis*, no.1, January/February 1996, p. 6.

¹⁵⁵ A. Skudder, paper LLM Equality Course 1995.

¹⁵⁶ Case C-457/93, Court of Justice, 6 February 1996, (*Kuratorium fuer Dialyse und Nierentransplantation eV - Lewark*).

time workers did, however, get full reimbursement for their loss of wages, the duration of the course did not exceed their working week. Mrs. Lewark claimed this was a case of indirect discrimination as more women than men have part-time jobs. The Court decided in her favour.¹⁵⁷

1.4.5. Pensions

In the *Defrenne I* judgement¹⁵⁸ it became clear for the first time that the concept of "pay" in Article 119 of the EC Treaty is a flexible one. The Court decided that statutory social security schemes are not covered by the principle of equal pay. There is no contract between employer and employee that entitles the employee to social benefits. The question is whether the reasoning can be reversed to mean that a pension scheme, based on a contract, is to be considered a form of "deferred" wages. Should this be the case, supplementary occupational pension schemes would have to meet the requirements of Article 119 of the EC Treaty.

The Court did not answer this question until it decided the *Bilka* case¹⁵⁹ in which it solved the issue. Benefits based on a contract between employer and employee are a form of "deferred" pay. This means that women and men have to be treated equally in such agreements. (Shortly afterwards, the Council adopted the Fourth Directive on equal treatment of women and men in non-statutory social security schemes).

The Court's decision in the *Barber* case came as a shock to the system.¹⁶⁰ In this judgement the central question was, whether different pensionable ages for women and men were allowed. Barber took part in a "contracted-out" occupational pension scheme. This supplementary occupational pension scheme is typical for the United Kingdom and replaces a state retirement benefit scheme. The scheme in this case worked with different pensionable ages. According to the Court, this constitute a violation of Article 119 of the EC Treaty. Occupational pensions must be equal for both sexes in all respects. The Court, however, restricted the retroactive effect of the *Barber* case to the date at which it delivered its judgement.¹⁶¹

The consequences of the *Barber* judgement were clarified by the Court in a number of more recent verdicts. The *Van Akker* case¹⁶² is about transitional arrangements provided for in Shell's occupational pension scheme. In 1985, the difference in pensionable age was abolished. As from that date, the pensionable age for women and men was 60 years. Shell applied a transitional measure for all female workers who participated in the pension scheme on January 1st 1985. These women were allowed to opt for the lower pensionable age of 55 years. This transitional arrangement was discontinued on 1 January 1991, as transitional measures were no longer allowed after the *Barber* verdict. The Court judged the solution to be correct.

¹⁵⁷ Consideration 39 of Case C-457/93. In a similar case dealing with training-courses for members of work-councils, the Court followed the same reasoning (Case C-278/93, Court of Justice 7 March 1996, (*Freers and Speckmann-Deutsche Bundespost*)).

¹⁵⁸ Case C-80/70, Court of Justice 25 May 1971, (*Defrenne-Belgium*).

¹⁵⁹ Case C-170/84, Court of Justice, 13 May 1986, (*Bilka-Weber*).

¹⁶⁰ Case C-262/88, Court of Justice, 17 May 1990, (*Barber-Guardian*).

¹⁶¹ See for information about this: M. van den Brink, 'Barber, een opbouwend arrest? Een inventariserend onderzoek naar de stand van zaken rond artikel 119 EG-Verdrag, bovenwettelijke pensioenen en het Barber-arrest, Emancipatieraad', 1993, Den Haag, Ministerie van Sociale Zaken en Werkgelegenheid.

¹⁶² Case C-28/93, Court of Justice, 28 September 1994, (*Van den Akker-Stichting Shell pensioenfond*s).

In the *Smith* case¹⁶³, the Court addressed the question as to whether equal treatment may also be obtained by a "leveling down" process. With regard to pensionable ages, this means raising the pensionable age of women to the level of that of men. The Court rendered a compromise solution. Between 17 May 1990 and 31 July 1991, the pension rights of men must be calculated on the basis of the lower pensionable age that applies to women. In new measures pensionable ages may be adjusted upwards. The pension rights accrued up by women may not be adversely affected.

In the Fourth Directive, Article 9 lists a number of exceptions to which the principle of equal treatment does not apply for the time being:

1. determination of the pensionable age (Article 9a),
2. pensions for surviving relatives (Article 9b),
3. actuarial calculations (Article 9c).¹⁶⁴

The first two exceptions have been invalidated in the meantime by the case law of the European Court.¹⁶⁵ The third exception has partly been put under restriction in the *Neath* verdict¹⁶⁶. The Court in this case paid too much attention to the costs aspect. An individual male or female can live longer or shorter than statistics indicate. According to the Court, to have an individual pay for the costs by just following the statistics (which are based on gender) according to the Court constitutes sex discrimination. If the substantive equality approach had been adopted, the average life expectancy of men (which is lower than that of women) would have been disregarded and the risks, inherent to the payment of pensions, would have been spread over all employees irrespective of their sex.¹⁶⁷ If in the *Neath* case the Court had ruled that using different actuarial calculation methods constitutes sex discrimination, this would have had important financial consequences. According to Fenwick and Hervey, this is the reason why the Court did not arrive at such a finding. The Court, however, could have limited the effect of its judgement in time, as it did in the *Barber* case, but it shied away from that. A judgement in favour of the plaintiff in the *Neath* case, would have meant that the Court had adopted the substantive equality approach, but this was not the case.

In order to incorporate the case law¹⁶⁸ into legislation on 16 May 1995, the Commission approved a proposal to amend a directive which is to be brought before the Council.¹⁶⁹ Summing up, it can be said that at present it remains unclear what conclusions Member States must draw from the various

¹⁶³ Case C-408/92, Court of Justice, 28 September 1994, (*Smith-Advel Systems Ltd.*).

¹⁶⁴ In 1987, a proposal was made for a follow-up directive regarding the implementation of the principle of equal treatment of women and men in statutory and non-statutory social security schemes, OJ of the EC, C-309/10, 19-11-87. Also see Commission Memorandum on the proposal for this follow-up directive.

¹⁶⁵ Cases C-262/88, Court of Justice, 17 May 1990 (*Barber-Guardian*), C-109/91, Court of Justice, 6 October 1993 (*Ten Oever-Stichting Bedrijfspensioenfonds*) and Case C-110/91, Court of Justice, 14 December 1993 (*Moroni-Collo*).

¹⁶⁶ Case C-152/91, Court of Justice of 22 December 1993, (*Neath-Steeper*). In this judgement, the question was whether different methods of actuarial calculations for retirement benefits for women and men constituted sex-discrimination. The Court avoided a clear answer to this question by stating that employers contributions did not qualify as remuneration as laid down in Article 119. The contributions of employees, however, were judged by the Court to fall within the concept of remuneration and as a consequence it was not allowed to make an exception to the rule laid down in Article 6, paragraph 1, sub 1, first sentence on the basis of Article 9, sub c, as contributions from employers according to the Court do not fall within the concept of remuneration of Article 119.

¹⁶⁷ H. Fenwick and T.K. Hervey, *Sex equality in the single market: new directions for the European Court of Justice*, loc.cit., p. 459

¹⁶⁸ See also J. Wouters, Pensions and sex discriminations in the case-law of the EC Court of Justice. This article will appear towards the end of 1996 in a volume to be published in connection with the conference "The Legal and Economic position of Women in the European Union in the 21st Century" held in Maastricht on 2 and 3 May 1996.

¹⁶⁹ Proposal for a Council Directive amending the Directive 86/378, COM(95) 186 fin., Brussels 16-5-1995.

judgements of the Court, which may lead to considerable differences between Member States. The Barber-protocol and more recent judgements offer inadequate guidance for policy making by the Member States.

1.5. Family Care and Paid Labour

1.5.1. General Remarks

A few years ago it was stipulated in ILO Treaty no. 156 that the term "employee" from then on needed to be read as "employee with family responsibilities." The labour organizations in the Member States are obliged to take this concept into account in collective labour contract negotiations. The national government cannot declare as binding labour contracts in which the family care responsibilities are not given due attention. The OECD document mentioned earlier states that combining family care tasks and participation in the labour market as well as the allocation of duties between women and men are the core themes of action for the coming years.

A comparison between the Member States of the European Community shows that the patterns of family care not only correspond with patterns of labour market participation by women, but also with the type of welfare state and type of economy of a country. Private care arrangements, public care facilities, social security and the type of market or economy are quite interdependent. Consequently, it is necessary to examine and assess policy measures in this interdependent context. In countries such as France and Denmark, labour market participation by women is high and remains at a constant level during the largest part of their potential working life. These countries typically have a large number of facilities for the youngest and oldest members of society. In countries such as the Netherlands, Germany and the United Kingdom, predominantly women take care of their own children. These countries have a substantial number of part-time workers, most of being women. The number of child day-care centers is strictly limited. On the other hand, they have relatively extensive facilities for the elderly. When the largest part of the child-minding task is behind them, women often re-enter the labour market. Countries such as Ireland, Spain and Luxemburg have few or no public day care centers or public facilities for the elderly for that matter. Care arrangements in these countries are a private matter mainly organized by the women themselves. Public facilities either don not exist or are very scarce. In Belgium, Portugal, Italy and Greece, women stay active in the work proces for a longer period of time. This indicates that there are supplementary facilities such as day care centers and guest families. In these countries, the "family" is a very central issue.¹⁷⁰

With regard to family care tasks and paid labour, three aspects stand out: the degree of distribution of unpaid labour between women and men; the degree to which unpaid labour can be farmed out; and finally the degree to which it is possible to stop working temporarily or to work less in order to allow time for family care activities.

1.5.2. The Allocation of Paid and Unpaid Labour between Women and Men

Unpaid care work is defined here as:

- housekeeping: cooking meals, house cleaning, washing and sowing clothes, shopping, organizing the household, outdoor chores and the time needed for transportation between these tasks;
- child care and care for other members of the family: caring for the baby and the children, helping children to do their homework, medical care, playing, walks, care for other family members, and

170 'Onbetaalde zorg gelijk verdeeld: Toekomst scenario's voor hervreiding van onbetaalde zorgarbeid'. Put together by the Commission Toekomstscenario's Hervredelig Onbetaalde Zorgarbeid, Den Haag, VUGA, 1995, pp. 43-46.

the time needed for transportation;

- do-it-yourself activities: house maintenance, bike maintenance, taking care of pets and plants, gardening, other odd jobs and handywork;

- helping relatives and others: informal help for relatives and others plus transport time.¹⁷¹

A number of factors determine the distribution of paid and unpaid labour between women and men. In the first place, it has become evident that the amount of time women and men spend on unpaid care duties is related to the degree to which they are occupied with paid work. More paid labour usually comes with less unpaid care work and the other way round. It can even be deduced from the distribution of paid and unpaid work in some European countries that it is easier for women to farm out their care duties (paid or unpaid) if they themselves work full-time, than if they are in part-time employment.¹⁷² Unpaid care duties and paid employment are in strong competition with each other. That is why participation in the labour of women and men is relevant to the distribution of unpaid family care work.¹⁷³ Secondly, the views on the roles of women and men in society have changed. At this moment, men as well as women wish to share unpaid work and to have more time at their disposal for activities other than those in the labour market.¹⁷⁴ In the third place, demographic change, such as the ageing of the population and the growing number of elderly people living on their own, influence the distribution of unpaid work. While on the one hand the demand for informal care services is growing, those who are supposed to supply these services (mainly women) are under great pressure due to the higher participation of women in the labour market. Finally, it appears that the lack of affordable and qualitatively acceptable child-care facilities often make it difficult to combine a paid job with family responsibilities at home. The demand for child-care facilities comes mostly from women who do not wish to leave the labour market after having a baby and from women who want to reenter this market¹⁷⁵.

¹⁷¹ Onbetaalde zorg gelijk verdeeld, Toekomstscenario's voor herverdeling van onbetaalde zorgarbeid, *loc. cit.*, p. 12.

¹⁷² OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 20.

¹⁷³ Onbetaalde zorg gelijk verdeeld, Toekomstscenario's voor herverdeling van onbetaalde zorgarbeid, *loc. cit.*, pp. 29-30.

¹⁷⁴ Women and Men in the European Union: A Statistical Portrait, *loc. cit.*, p. 96.

¹⁷⁵ Onbetaalde zorg gelijk verdeeld, Toekomstscenario's voor herverdeling van onbetaalde zorgarbeid, Commissie Toekomstscenario's Hervreiding Onbetaalde Arbeid, *loc. cit.*, p. 49.

1.5.3. Day-Care Centers

It has become evident that having children constitutes a major obstacle for women to continue participating in the labour market.¹⁷⁶ Asked what advantages they enjoy from European Community legislation, none of the women interviewed answered that child care facilities had become more readily available.¹⁷⁷ When women in the European Community are asked in what areas the authorities should take measures to improve family life, it appears that women need arrangements that simplify the practical organization of family life: such as flexibility in working hours, day nurseries, child care facilities outside school hours and parental leave¹⁷⁸.

In 1992, the Council adopted a recommendation regarding day nurseries.¹⁷⁹ This recommendation recognizes that better child care facilities will increase people's mobility in the European labour market. Children of parents who work, are looking for employment or follow training courses, should have access to such facilities. Suggestions were formulated about special leave for working parents, as well as about the division of responsibilities between women and men for child care. Responsibility for improving facilities lies with both the government, employers and private institutions. The original proposal of the Commission also contained a provision that aimed at improving the status and legal position in the labour market of workers in the child care sector.

The European Commission has decided to reward companies and organizations that have made an effort to help parents to combine work and family life, by offering a European Prize for Social Innovation. Two types of initiatives will be rewarded:

- The most efficient measures aimed at bringing about a better balance between paid employment and family life (through special arrangements, such as working hours, working at home, career-interruption, sabattical, parental and family leave as well as help in the family for child care, catering at the work-place and laundry services for the home);
- Support for families with no fixed abode, no educational facilities, etc.¹⁸⁰

1.5.4 Family Care Leave

Family care leave is used here for leave that may be granted to those who have to take care of close relatives. This means care for both the elderly and children. A directive on parental leave has not been

¹⁷⁶ Women and Men in the European Union: A Statistical Portrait, *loc. cit.*, p. 130. See also deliberations of the European Parliament in plenary session of Strasbourg on 14-2-96, in which the British Member of Parliament Watson argued that women in particular pay the bill of cuts in public expenditure (for instance regarding facilities for child care and care for the elderly) Agence Europe, 15-2-1996.

¹⁷⁷ Women and Men in the European Union: A Statistical Portrait, *loc. cit.*, p. 206.

¹⁷⁸ Women and Men in the European Union: A Statistical Portrait, *loc. cit.*, p. 96.

¹⁷⁹ Recommendation of the Council 92/241/EEC of 12 March 1992, OJ L 123/16, 8-5- 1992.

¹⁸⁰ EUR-OP news, year 4, no. 2, summer 1995.

adopted by the Council.¹⁸¹ As a result, the Commission has on 22 February 1995 approved the opening of negotiations on this subject with social partners on the basis of Article 3, paragraph 2, of the Agreement on Social Policy between the 11, now 14, Member States.¹⁸² In this context, the Commission has sent a document to the social partners that deals with all aspects of the recognition of paid employment and care tasks. It proposed to have a discussion on a wider range of subjects than parental leave alone and wishes to apply a more general approach in promoting the combination of employment and family life. In doing so, the Commission refers to the Council recommendation regarding day nurseries, which not only demands more child care facilities, but also advocates greater flexibility in the organization of the work process to make it possible for men in particular to contribute to the education of children. On 6 November 1995, the social partners agreed on an arrangement for parental leave¹⁸³. This arrangement enables every woman and man from now on to take at least 3 months leave for the education of children up to 8 years old. Everybody is entitled to parental leave regardless of the type of employment contract or the size of the company. Furthermore, parental leave can be taken on a part-time basis or in installments. The Agreement also contains a clause regarding the leave for urgent family business. During parental leave, social security provisions (such as health care, unemployment and retirement benefits) continue to be operative. The proposal, however, also contains a number of difficulties. All social security aspects and the question of pay during parental leave¹⁸⁴ are left to the discretion of Member States. This also applies to the length of parental leave and leave in case of calamities. In conclusion, it can be said that steps have been taken in the right direction, but that much still depends on the goodwill of the various Member States. To enter into force, the Agreement must first have been approved formally by the European Ministers of Social Affairs.¹⁸⁵ This approval has been given.

1.6 Summary

- Since 1975, six directives and four action programmes have been adopted in the field of equal treatment of women and men.
- In 1991, eleven Member States signed the Agreement on Social Policy, which contains measures to improve the status of women. On the basis of this Agreement more measures with regard to equal treatment of women and men can be achieved. Unfortunately, these regulations do not apply to all Member States of the European Community. The United Kingdom has not joined the

¹⁸¹ Proposal for the Council Directive concerning parental leave in family circumstances, COM(83) 686 fin., OJ C-333/6, 9-12-1983 and the amended proposal for a Council Directive concerning parental leave and special leave in family circumstances. OJ of the EC, C 16/7, 27 November 1984.

¹⁸² Law Network Newsletter, no. 13, 1995, V/5957/95EN, p. 1.

¹⁸³ Proposal for a Council Directive, Brussels, 14 and 15 December 1995, 126. Ex./12.95/3.

¹⁸⁴ Research has shown that men more readily exercise their right to parental leave if it is paid leave. Parental leave is a first step in the change-over to a different pattern of work for men. This will have a favourable influence on the redistribution of paid and unpaid labour between women and men. E. Wierda, 'Mannelijkheid? Mannelijkheid! Over bankovervallers, eenzame helden, zorgverlof en het duel', in: Tijdschrift voor vrouwen studies, 1995, year 16, no. 2, p. 222.

¹⁸⁵ NRC-Handelsblad 7 November 1995. Jessica Larive, Rapporteur for the Work-document of 10-1-1996 (*loc. cit.*, p. 4), applauds the agreement on parental leave.

Agreement.

- The principle of subsidiarity does not apply to the social policies of the Community, such as the policy regarding equal treatment of women and men, which implies that Community actions in this field are called for.
- Direct and indirect discrimination are not permitted by the Court, although in this matter the Court mainly uses a formal equality approach.¹⁸⁶
- In many law suits on equal treatment the burden of proof lies with the plaintiff, while much of the evidence is in the hands of the defendant. This is an obstacle for proving discrimination.
- Article 119 of the EC Treaty ensures equal pay for equal work. The Court also recognizes the principle of equal pay for work of equal value.
- At present there is no clear provision with regard to the admissibility of positive action and the way in which it may be implemented.
- In various respects the legal position of part-time workers leaves much to be desired.
- There is still a lot of obscurity and inequality in the field of retirement benefits, for instance with regard to pensionable age and actuarial methods of calculation.
- Women would be able to participate more in paid employment if paid and unpaid work were more evenly distributed among women and men, if there were more and better child care facilities and if there were good regulations with regard to leave for family care tasks.

Women do not feel they profit from European Community policies with regard to equal treatment. When asked, 51% of them responded that Community policies were of no advantage to them, 29% did not know, 19% answered in the affirmative and 1% did not answer. Those who thought Community policies are of no advantage to them gave the following reasons: "I did not know the Community did anything for women" (39.9%), "EU policies are too remote from every-day life" (19.2%), "The EU seems more involved with economic and agricultural affairs" (15%), "Maybe other women profit from it, but in any case I don't" (12.9%). Women who indicated they had benefitted from EC policies, felt this was mainly true in the areas of:

- equal pay (25%)
- improvement of the image of women in society (20.9%)
- legislation in the field of equal treatment (20.6%)
- support to enable women to combine paid work and care tasks (20.5%).¹⁸⁷

In conclusion, it can be stated that much remains to be done to improve the status of women in the European Community.¹⁸⁸ In the next chapter the researchers will seek to formulate some proposals to this effect.

¹⁸⁶ On this subject also see: T. Hervey, 'Finding the limits: Conceptions of equality in the European Court of Justice', expected to be published towards the end of 1996 in a volume appearing in connection with the conference "The Legal and Economic Position of Women in the European Union in the 21st Century", held in Maastricht on 2 and 3 May 1996.

¹⁸⁷ Women and men in the European Union: A Statistical Portrait, Luxemburg: Office for Official Publications of the European Communities, 1995, pp. 204-206. Also see U. Liebert, 'The gender gap in the European integration', a paper written in connection with the conference "A world in transition, feminist perspectives on international relations", held in Lund on 14-16 June 1996.

¹⁸⁸ "On the basis of the current pace of progress, parity between men and women would be reached in 475 years" according to A. Hubert during the conference "The Legal and Economic Position of Women in the European Union in the 21st Century" on 2 and 3 May 1996 in Maastricht.

Chapter 2

Amending Community law in order to improve the (legal) position of women in the European Community

Introduction

With reference to the various problems within Community law identified in chapter one, in this chapter proposals will be made for improving the position of women in the Community. In particular, the first part "Principles" and Title VIII of the third part "Policy of the Community" of the EC Treaty will be scrutinized more closely. In the following, proposals will be made for amending the Articles 3 and 100a of the EC Treaty. Furthermore, a number of new Articles will be formulated, namely Articles 6a, 118c and 119a. All amendments proposed and new articles will be accompanied by an explanation. Last but not least suggestions are made for implementing the proposed measures in practical terms.¹⁸⁹

2.2. Proposals for amending and extending the EC Treaty

Part one, Principles

Activities for the realization of the objectives set out

Article 3 of the EC Treaty, current text

Proposed Article 3 of the EC Treaty

A new paragraph is added to Article 3, namely paragraph u

Explanatory notes

To explain the amendment to Article 3, something will have to be said about Article 2 first. The Maastricht Treaty introduced a number of amendments to the original Article 2 of the EC Treaty. The list of objectives of the Community was extended with "a high level of social protection" and to this end the Treaty provides for Community "policy in the social sphere comprising a European Social Fund" (Article 3 sub i of the EC Treaty). Balanced and sustainable economic and social progress is impossible without complete participation and support of the whole population of the Community, of which women constitute at least half.¹⁹⁰ This is recognized by Article 3, which requires the

¹⁸⁹ Frances Olsen pleads for using judicial proceedings in the European Court of Justice, in order to be able to reach a higher level of equality between women and men. F. Olson, Employment discrimination in the new Europe: A litigation project for women, a paper written in connection with the conference "A world in transition, feminist perspectives on international relations", held in Lund on 14-16 June 1996.

¹⁹⁰ A report of the Committee on Women's Rights of the European Parliament observed that too little attention is paid to the consequences for women of economic unification. This document also contains a draft resolution which lists a number of issues needing regulation, such as discouraging discrimination in the labour market, promoting participation of women and making work more parent-friendly. (Session documents European Parliament, Report of the Committee on Women's Rights on

Community to adopt a policy directed at the actual realization of equality.¹⁹¹ Actual equality has to be reached by a balanced participation of women and men in the establishment of the common market and the Economic and Monetary Union. Only then will the necessary economic and social cohesion, postulated among others in Article B of the Maastricht Treaty, be maintained or effectuated.

Actual equality is the result of equal treatment. The result to be achieved is a change in the actual balance of power between women and men.¹⁹² This implies taking into account the biological and social differences existing between them.¹⁹³ In chapter one attention has been paid to the fact that the Court of Justice still tends to work with a formal equality approach.¹⁹⁴ If the social and biological differences between women and men are not taken into account, equal treatment only gives women a powerful weapon if they find themselves in a situation identical to that of men, which is usually not the case. The question as to which differences between women and men are legally relevant needs to be asked. Whereas sex is irrelevant for the right to vote, it is a relevant biological difference for regulating pregnancy and childbirth leave. Apart from that, there are social differences between women and men that may be relevant to the solution of specific problems. Treating women and men differently in measures concerning parental leave is not only important in view of biological differences, it is also important in view of the different roles that women and men can still play in society. The question of the relevance of social differences can hardly or not at all be treated if a purely formal approach to equality is taken. In this approach, in principle gender is not a reason for making distinctions. In the substantive equality approach, the fact that the position of women is determined in practice to a large extent by the circumstances that they usually perform unpaid duties must be considered. The danger exists that the recognition of social inequality in and through legislation may lead to perpetuation of inequality and a stigmatization of women. In legislation a neutral concept may be chosen, (for example "persons with family responsibilities" instead of "women with family responsibilities"), so that at least the legislation does not contribute to existing role pattern. The legal system will in practice have to offer more than just one perspective. Equality must not be equated with uniformity and assimilation towards one specific standard.¹⁹⁵

the Internal Market 1992 and its consequences for women in the European Community, Rapporteur: M. van Hemeldonk, 6 December 1990, A3-0358/90/part A + B, EP 143.485/fin./part A).

¹⁹¹ An amendment of Article 3 has also been proposed by a working group chaired by Freixes Sanjuan (T. Freixes Sanjuan, M. do Carmo Romao, K. Kenny en V. Ecker, Proposed reform of the European Union Treaty in the following areas: fundamental rights, equality between men and women, citizenship, economic and social rights, Barcelona, August 1995, unpublished).

¹⁹² See also J. E. Goldschmidt and R. Holtmaat, *Vrouw en Recht*, Trendrapport, DCE/STEO, Den Haag, 1993, p. 26. They use the concept of "actual equality" rather than "actual equal treatment". Researchers prefer the latter, because "actual equal treatment" implies a more active approach, while "actual equality" seems to imply more a state of affairs.

¹⁹³ See on this: A. Veldman, *Effectueren van social-economisch recht volgens de chaostheorie*, *loc. cit.*, p. 163. Biological differences only covers pregnancy and breastfeeding.

¹⁹⁴ See paragraphs 1.3.2., 1.3.3. and 1.4.5 of chapter one. See on formal and substantive equality: Bleckmann, *Die Struktur des allgemeinen Gleichheitssatzes*, Carl Heymans Verlag KG, Köln, Berlin, Bonn, München, 1995.

¹⁹⁵ J.E. Goldschmidt and R. Holtmaat, *Vrouw en Recht*, Trendrapport, *loc. cit.*, pp. 26-31.

Fout! Bladwijzer niet gedefinieerd.

In conclusion, it can be said that so long as social differences, between women and men, these differences have to be explicitly taken into account. This can be achieved by neutral legislation, providing this legislation actually results in equal treatment of women and men.

The principle of equality

Proposal for the new Article 6a of the EC Treaty

Explanatory notes

General considerations

As stated before, on the basis of Article F of the Maastricht Treaty, the European Community is expected to respect the fundamental rights laid down in the ECHR.¹⁹⁶ These days, Member States are subject to the control mechanisms of the ECHR, but the institutions of the European Community and European Community law as such are not.¹⁹⁷ This means that a complaint put before the European Court of Human Rights in Strasbourg against an institution of the Community that has acted in breach of the ECHR, may be declared inadmissible. It is to be recommended that a non-discrimination clause (and possibly other fundamental human rights) be incorporated into EC law.¹⁹⁸ In this way, the ECHR can serve as a safety net, not, however, as the basis for fundamental rights in the Community.¹⁹⁹ What is more, the ECHR has a non-discrimination clause, but does not contain a principle of equal treatment of women and men.

The principle of equality and the non-discrimination principle as laid down in the article the researchers proposed by us are fundamental rights. They must be distinguished from provisions on social and economic policy. The application of the latter often depends on the social and economic level attained by the particular country. Fundamental rights, however, are applicable under all circumstances; they apply to everyone within the Community and not just to "citizens" or "employees".²⁰⁰

¹⁹⁶ See paragraph 1.3.1. of chapter 1 of this report. From a draft recommendation (10-1-96, *loc. cit.*, p. 4) of the Committee on Women's Rights, it appears that "the guarantee of fundamental rights must imply more than the general principle laid down in the Maastricht Treaty (Article F). For Article F see: annex II to the present report. One way of achieving this is formal accession to the European Convention on Human Rights and Fundamental Freedoms and to the Social Charter of the Council of Europe.

¹⁹⁷ Verslag van de Denkgroep inzake een herziening van het EG-Verdrag, Messina, June 2nd 1995, SN5 19/95, Reflex 20, p.12.

¹⁹⁸ Also see J.H.H. Weiler, *European Citizenship and Human Rights*, 1995, unpublished.

¹⁹⁹ Draft Report European Parliament, Recommendation of the European Parliament on convoking the IGC, Evaluation of the Reflection group and establishment of the political priorities of the European Parliament in view of the IGC, Rapporteurs: R. Dury and J. Maij-Weggen, DOC-NE/PR/290/290341, EP 216.237A, 25 January, p. 3. This report advocates in favour of the European Union's accession to the European Convention on Human Rights.

²⁰⁰ Also see R. Blanpain, B. Hepple, S. Sciarra and M. Weiss, *Fundamental social rights: proposals*

Paragraph 1, first sentence

To be able to accomplish actual equality, as mentioned in the proposed Article 3 of the EC Treaty, the principle of equal treatment of women and men must be applied. As stated already in the explanatory notes to the proposed Article 3 of the EC Treaty, this means that the differences between women and men should be taken into account. The principle of equality should be embedded in the texts and not only be construed as a consequence of prohibited discrimination. The principle of equality and the non-discrimination principle are two sides of the same basic principle. The two approaches are, however, different and this means that the obligations for the Member States and citizens of the European Community are different. Whereas the principle of non-discrimination mainly obliges the Community and Member States to refrain from certain actions, the principle of equal treatment requires a more active role, among others, in respect of social policy. Laying down both a principle of equality and a non-discrimination principle prevents *lacunae*.

Except for Article 119 of the EC Treaty, there are no Articles concerned with the equal treatment of women and men in primary EC law. Articles 100 and 235 of the EC Treaty offer the possibility of drawing up non-discrimination legislation. Both Articles require a unanimity. The text of the directives ex Articles 100 and 235 of the EC Treaty offers a considerable number of possibilities for excepting certain matters from equal treatment.²⁰¹ Furthermore, the means employed to compel Member States to observe the requirements formulated in these directives are not very efficient. For this reason, many plaintiffs base their complaint on Article 119 of the EC Treaty, especially in matters of remuneration and equal treatment in the work process.²⁰² Article 119 of the EC Treaty constitutes much too narrow a basis, however, to enforce equal treatment in all fields. This means that the principle of equality must be reinforced and extended to all fields and not just to equal pay for equal work (Article 119 of the EC Treaty).²⁰³

Having a principle of equal treatment in the first part of the EC Treaty, as proposed here, implies that it would be part of the basic principles of the Community, which need to be observed in performing its tasks. If the principle of equal treatment were incorporated in the second part of the EC Treaty regarding citizenship of the Community, this would have the undesirable effect that it would only apply to citizens of the Community.²⁰⁴ In that case, non-citizens of the Community would not be able

for the European Union, Leuven, 1996, p. 12.

²⁰¹ Burrows, The future of sex equality in the EC, loc. cit., p.52.

²⁰² C. Boch, The European Community and sex equality: why and how? loc. cit., p.19.

²⁰³ Reflection Group's report: IGC 1996, SN 520 IQ5 (REFLEX 21), Brussels, 1995, p. 11. See also the Resolution of the European Parliament on the implementation of the Treaty on European Union in view of the forthcoming IGC 1996; realization and development of the Union, A4-0102/95, Rapporteurs: J. Boulanges and D. Martin, 17 May 1995, EP 190.441, pp. 5-6. See also the report on the implementation of the Treaty on European Union in view of the forthcoming IGC 1996. Realization and development of the Union: Recommendation of the Committee on Women's Rights to the Committee for Institutional Affairs. Rapporteurs: C. Drawly and M. Lenz. A4-0102/95/part II; EP 212.450/partII/fin..

²⁰⁴ A Draft Report of the European Parliament favours implementing the principle of equal treatment and non-discrimination into the chapter on European Citizenship of the Maastricht Treaty,

to not derive rights from Articles 8a to 8d of the EC Treaty. This could have a negative effect on women in particular. Suppose a Dutchman were to marry a Moroccan woman. He works for a multinational company and the couple move every few years from one Member State to another. They never stay long enough in one country to acquire the nationality of one of the EC Member States. For the husband this does not constitute a problem, since he has Dutch nationality and the Netherlands is a Member State of the Community. For his wife, however, it is disadvantageous, for this way she will never become a citizen of the European Union and consequently will never be able to exercise the rights attached to Community citizenship (Article 8 of the EC Treaty).²⁰⁵

When interpreting the meaning and scope of the principle of equality, the Court can draw inspiration from other international instruments containing a principle of equal treatment between women and men, such as the Convention on the Elimination of Discrimination against Women. In addition, the recommendations of the CEDAW (Committee on the Elimination of Discrimination Against Women) can be used in interpreting and applying the principle of equality.²⁰⁶

The term "principle of equal treatment" has been borrowed from the various Council Directives.²⁰⁷ This way, we stay in tune with already existing legislation in the field of equal treatment in the European Community.

Paragraph 1, second sentence

The EC treaty does not contain an article prohibiting discrimination on the grounds of sex. Various directives have such an Article, but the areas in which discrimination on the grounds of sex is prohibited are limited in number. They refer to the access to work, terms of employment, vocational training and social security. Admittedly, the principle of equal treatment of both sexes forms part of Community law, but this only means that it is a principle that applies to the Community institutions and to Member States whenever they act within the framework of Community law.²⁰⁸ This, however, does not yet make it into a general principle of justice in the Member States. Advocate-General Capotorti has interpreted the scope of the principle as follows:

"The rule that there should be no discrimination is a general principle of the Community legal order. It is a principle contained in the list of fundamental human rights recognized within the Member States and within the context of the European Convention on Human Rights and Fundamental Freedoms; consequently it forms part of Community law and must be protected by the Court of Justice... I may add that in the context of positive law and modern legal

Draft Report EP 25-1-96, *loc cit.*, p. 3.

²⁰⁵ See for general information on women and citizenship: R. Voet, *Feminism and citizenship: feminist critiques of the concept of social liberal citizenship*, thesis of 23 February 1995. see also: S. Peers, 'Towards equality: actual and potential rights of third-country nationals in the European Union'. in: *Common Market Law Review* 3, 1996, p. 7.

²⁰⁶ Analogous to the Limburg Principles. in: *Human Rights Quarterly*, vol. 9, 1987, no. 41, p. 121.

²⁰⁷ See Council Directives 79/7/EEC of 19 December 1978, 86/378/EEC of 24 July 1986 and 86/613/EEC of 11 December 1986.

²⁰⁸ S. Prechal and N. Burrows, *Gender discrimination law of the European Community*, Aldershot, Dartmouth Publishing Company Ltd., 1990, p. 11.

thinking, the exclusion of discrimination on the grounds of sex is one of the fundamental features of the principle in question.... the respect for fundamental rights is a limitation on all Community acts: any measures whereby the powers of the Community institutions are exercised is subject to that limitation and in that sense the entire structure of the Community is under an obligation to observe that limitation".²⁰⁹

In these cases the Court stated:

"...in relations between the Community institutions on the one hand and their employees and dependants of employees, on the other, the requirements imposed by the principle of equal treatment are in no way limited to those resulting from Article 119 of the EC Treaty or from the Community directives adopted in this field."

In other words, employees working for one of the institutions of the Community, for example the Commission, derive more rights from the non-discrimination principle than workers elsewhere in the Community. The latter can only derive rights from specific, directly applicable Community provisions. Advocate-General Capotorti has put it as follows:

"...in the Community order there exists no principle having direct effect which confers on individuals within the Community the right to enjoy equal working conditions without discrimination on grounds of sex"²¹⁰.

In order to solve the problems mentioned above, the researchers recommend the inclusion of a non-discrimination clause in the EC Treaty, which does not specify the areas in which discrimination is prohibited and which lists the grounds for discrimination can, in either an exhaustive or non-exhaustive way. Although the researchers only mention discrimination on the grounds of sex: everything is to be said, however, for a general (non-)discrimination clause with a non-exhaustive enumeration of grounds, to be inserted into the Treaty. Various groups that are preparing the Intergovernmental Conference have advocated a non-discrimination article.²¹¹ Grounds to be included would be "sex, race, colour, sexual preference, invalidity, language, religion, political or other opinion" followed by "or other status". In discussing paragraph 2, however, we will, restrict ourselves to discrimination on the grounds of sex.²¹²

For our purposes discrimination is defined as any form of difference, exclusion or restriction aimed at

²⁰⁹ Cases 75/82 and 117/82, European Court of Justice March 20th 1984 (*Razzouk - Commission*).

²¹⁰ Case 149/77, European Court of Justice June 15th 1978 (*Defrenne-Sabena*).

²¹¹ Also see: W. Devroe and J. Wouters, *De Europese Unie: het Verdrag van Maastricht en zijn uitvoering: analyse en perspectieven*, *loc. cit.*, paragraph 836; IGC 1996 Reflection Group's Report, *loc. cit.*, p. 11-12; L. Waddington, *Disability Employment and the European Community*, Report presented to the European Parliament on the occasion of the third European Day of Disabled People, 3rd December 1995, p. 110. Some authors have agreed a non-discrimination clause with only gender as a ground of discrimination. See on this: T. van Vleuten, "Sekse-discriminatie: een probleem apart?" in: *Nemesis*, no. 3, 1987, p. 123. Also Draft Recommendation, Rapporteur: Anne van Lancker, 10 January 1996, *loc. cit.*, p. 4.

²¹² L. Flynn, 'Europe on its way to a general non-discrimination clause', a paper written in connection with the conference "The Legal and Economic Position of Women in the European Union in the 21st Century", held in Maastricht on 2 and 3 May 1996.

or resulting in adversely affecting or eliminating the recognition, the enjoyment or the exercise by women of the rights laid down in the EC Treaty or in the Maastricht Treaty.²¹³

The Court, not only prohibits direct discrimination, but also indirect discrimination. Indirect discrimination has been recognized by the Court.²¹⁴ The criteria to be applied, and the manner, in which they should be applied, to determine the existence of indirect discrimination, are not yet clear. In chapter one it has been made clear that the Court of Justice, in such cases as *Bilka* and *Enderby*, has drawn up a detailed formula for the reversal of the burden of proof, in order to ascertain indirect discrimination.²¹⁵ This formula could be written into a directive. Objective grounds of justification can be submitted to prove there is no case of indirect discrimination. A closer look needs to be taken at the justifications that are acceptable in practice. There is case law on the subject, but other areas of Community law, such as the case law regarding the application of the principle of proportionality, may also be looked into. This case law can be used as an aid in determining measures which are suitable and necessary to serve as objective justification of indirect discrimination.²¹⁶

Paragraph one, first sentence, is a provision which can be directly applied. Prospective Member States will have to have abolished all *de iure* discrimination, at the moment they become a member of the European Community. Measures resulting in *de facto* discrimination will have to be lifted promptly.²¹⁷

The phrasing of paragraph one, first sentence, follows the text of Article 6 of the EC Treaty.

Paragraph 2

The non-discrimination clause of paragraph one mainly postulates non-action on the part of Member States and the Community. To guarantee and uphold the principle of equal treatment an active policy on the part of Member States and the Community is needed. Concrete measures must be taken to this effect.

The formulation of paragraph 2 follows the text of the second full sentence of Article 6 of the EC Treaty. In the proposed provision, we have opted for the procedure of Article 189b rather than that of Article 189c of the EC Treaty. The procedure of Article 189b grants more powers for the European Parliament. The researchers feel that more democratic decision-making procedures in the Community are needed, especially since the Community is going to interfere in a ever decreasing degree in the

²¹³ See also Article 1 of the Convention on the Elimination of Discrimination against Women: "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural civil or any other field."

²¹⁴ See the Cases C-96/80 European Court of Justice March 31st 1981 (*Jenkins-Kingsgate*), C-170/84 European Court of Justice, May 13th 1986 (*Bilka-Weber*) and the Case C-421/21, (1994) ECR I-1-1657 (*Habermann-Beltermann*).

²¹⁵ See paragraph 1.3.4..

²¹⁶ S. Prechal, *Combating indirect discrimination in Community law context*, *loc. cit.*, p. 95.

²¹⁷ Limburg Principles, *loc. cit.*, nos. 35, 37 and 38.

lives of its citizens.²¹⁸ The researchers wish an advisory role for the Economic and Social Committee, as this Committee is made up of representatives of all sectors of the Economic and social life and therefore reflects the societies of the Member States of the European Community. The formulation of paragraph 2 is also used in the proposed Articles 118c and 119a.

Title V

Common Rules on Competition, Tax Provisions, and the Harmonization of Laws

Measures of harmonization

Article 100a of the EC Treaty, current text

Proposal for Article 100a

Explanatory notes

Articles 100, 100a, 118a and 235 of the EC Treaty serve as a legal basis for the social legislation of the EC Treaty. These Articles have some disadvantages. Articles 100 and 235 EC Treaty require voting by unanimity. The possibility of adopting social measures by qualified majority is restricted to Articles 100a or 118a. Paragraph 2 of Article 100a, however, contains the exception that qualified-majority voting does not apply to fiscal provisions and provisions relating to the rights and interests of workers. On the basis of Article 100 or 235 of the EC Treaty, all measures related to the free movement of persons and the rights and interests of workers must be adopted by unanimity. Article 118a, paragraph 1, EC Treaty allows all measures regarding the improvement of the working environment to be taken by a qualified majority (see Article 118a, paragraph 2 of the EC Treaty). The Commission endeavours to adopt as many measures on social policy as possible by qualified majority instead of unanimity as prescribed by Articles 100 and 235 of the EC Treaty, by interpreting Article 100a, paragraph 2, restrictively and by using extensive interpretation of Article 118a.2

²¹⁹ For this reason the researchers propose to eliminate the phrase "the provisions relating to the rights and interests of employed persons" in paragraph 2 of Article 100a. Article 100a, paragraph 1, can then be used as a legal basis for taking measures according to the procedure of Article B in the field of equal treatment of women and men in the working process. Measures for the implementation of articles proposed by us in Title VIII (Article 118c and 119a) can then be taken ex Article 100a, paragraph 1, of the EC Treaty²²⁰.

Title VIII

Social Policy, Education, Vocational Training and Youth

Equal treatment of women and men is an element of social policy. In spite of the work done in this field, there are still important inequalities in the treatment of women and men in the fields of social

²¹⁸ The Committee on Women's Rights also feels that the entire decision-making process be made more transparent and democratic, which implies, that the European Parliament will have full control under the decision-making procedure. Draft Recommendation, 10-1-96, *loc. cit.*, p.5.

²¹⁹ P. Watson, Social policy after Maastricht, *loc. cit.*, p. 485.

²²⁰ The Committee on Women's Rights argue that all matters concerning equal treatment require a qualified majority in decision-making. Draft Recommendation of 10 January 1996, *loc. cit.*, p.5.

security, work and decision-making. The researchers do not subscribe the premise formulated in Article 117 of the EC Treaty that improvement of the working conditions and standard of living will automatically ensue from the functioning of the common market. Although Community law aims at achieving social advantages as a result of economic advantages. Social advantages in this view are seen as a spin-off of economic advantages.²²¹ The Spaak report²²² already recognized that certain differences could not be corrected by having a free market as such. The example given is unequal remuneration of women and men. Apart from this, in a 1972 Paris meeting, the Member States declared that they wanted a "human social" approach and that a social policy was considered as important as an Economic and Monetary Union.²²³ As long as women and men find themselves in different positions, there will be no improvement of the standard of living and working conditions for everyone. Legislation is necessary to let everybody profit from the advantages of the common market.²²⁴ Community law provides an obligation to promote progressive improvement of the standard of living and certainly does not permit its deterioration.²²⁵ To include the concept of economic and social cohesion in the EC Treaty amounts to recognition of the unacceptability of social exclusion in a Community that has as one of its objectives the improvement of the standard of living.²²⁶ Social policy legislation does not constitute a impediment to economic efficiency, but rather a necessary component of economic progress. Economic growth will not in itself lead to a high level of employment and to integration into the labour market of those, who used to be excluded from it. To obtain this objective an active social policy is needed. This implies that social policy should not play second fiddle to economic development and the functioning of the single market.²²⁷ In our view, abolishing discrimination and realizing actual equality are a precondition for improving the standard of living and working conditions in the Community. Women find themselves in the most vulnerable positions in all Member States; they usually are the ones with flexible contracts, they receive lower salaries than men, are more often unskilled and find themselves more often at the head of a single parent family. Their position may deteriorate even further, if no attention is paid to their specific problems.

A study group headed by Blanpain has proposed an amendment to Article 117 of the EC Treaty. This proposed Article lists ten fundamental social rights, among them the right to equal opportunity and equality of treatment of women and men.²²⁸ Researchers, however, are not in favour of inserting

²²¹ H. Fenwick and T. Harvey, Sex equality in the single market: new directions for the European Court of Justice, *loc. cit.*, p. 448.

²²² See on this: P. Kapteyn, VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen*, Deventer, Kluwer, 5th ed., 1995.

²²³ N. Burrows, 'The future for sex equality in the EC', *loc. cit.*, p. 56.

²²⁴ Equally the Committee on Women's Rights of the European Parliament in its Report on the Internal Market 1992 and its consequences for women in the European Community. Rapporteur: M. van Hemeldonk, *loc. cit.*, p. 2.

²²⁵ N. Burrows, The future for sex equality in the EC, *loc. cit.*, pp. 59-60.

²²⁶ N. Burrows, The future for sex equality in the EC, *loc. cit.*, p. 63.

²²⁷ R. Blanpain and others, 'Fundamental social rights: proposals for the European Union,' p. 10.

²²⁸ The proposal by Blanpain and others for Article 117 is as follows:
 "Article 117 [Fundamental Social rights]
 The Member States agree that labour is not commodity, and that everyone has the right to lead a life in

fundamental social rights in Article 117 EC Treaty. These rights belong in part one (Principles) of the EC Treaty, for example, in a catalogue of fundamental rights. In this Title amendments are proposed in the fields of professional activities, vocational training and social security.

Equal treatment of women and men with regard to professional activities and vocational training

Explanatory notes

Paragraph 1

In respect of "work", the Ec-Treaty only provides rules concerning paid labour, because of its role in economic life. No attention is paid to the fact that the work pattern of women in particular is still predominantly made up of paid and unpaid work, such as child care, or caring for elderly relatives.²²⁹ The fact that women usually have more care responsibilities than men, constitutes a heavy impediment to finding and to keep holding on to paid employment. Employers often pay inadequate attention to the family duties of their employees. In the current social state of affairs, women and men are not equal to each other in this respect; in fact, various social and biological differences exist. Therefore, strictly formal approach cannot lead to actual equality. One aspect of the principle of equality will have to focus on the question of whether (and in which cases) women and men find themselves in different circumstances. On the other hand, there is the problem of the criteria for action to be

accordance with human dignity and with adequate social protection.

To this end, the European institutions and the Member States, having due regard to the reciprocal obligations of all those concerned, shall take appropriate measures, whether general or specific, to guarantee economic and social rights. They shall abstain from any measure which could jeopardise their realisation.

These rights include specifically:

1. The right to work, and to earn a living in an occupation freely entered upon;
2. The right to life-long education, vocational guidance and training;
3. The right to equitable remuneration, to just terms and conditions of work, and to protection against unjustifiable termination of employment;
4. The right to equality of opportunity and equality of treatment, without distinction of any kind, such as race, colour, ethnic, national or social origin, culture or language, religion, conscience, believe, political opinion, sex or gender, marital status, family responsibilities, sexual orientation, age or disability;
5. The right to health and safety in the working environment;
6. The right of children and young persons, pregnant women and those who have recently given birth and the elderly to protection;
7. The right to protection of health, to social security, to social and medical care, and to benefit from social welfare services;
8. The right to personal privacy in respect of employment and occupation;
9. The right to associate, to organize, to bargain collectively, and to resort to collective action in the event of a conflict of interests;
10. The right to information, consultation and participation, in respect of decisions affecting the interests of workers."

²²⁹ The OECD report in this context speaks of the 'gender contract', which presupposes that women take care of the largest part of unpaid labour. OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 19.

undertaken in cases where social inequality is observed.²³⁰ In as much as equal treatment presupposes a reference group, there is a danger, according to Wentholt, of accepting current standards without questioning their justification.²³¹ Up till now, the quest for the equality between women and men has too exclusively focused on the participation of women in the labour market. Women, like men, had to enter the paid labour market. However, at the same time they remained mainly responsible for family and care-duties. So far, little attention has been paid to men carrying out family- and care responsibilities. This disadvantages women in two ways. In the first place, women carry a double burden. This comes with a prise, increased stress, lower productivity, more sickness, absence from work and drop-outs from the work force among employees with family duties and women in particular.²³² A continuous double burden can have an adverse effect on the redistribution of tasks. Women may become discouraged if constantly trying to combine their various tasks and may decide to return to their traditional role.²³³ In the second place, in a labour market which is built on the idea of constant availability for work, without career interruptions or parental obligations, female employees with children are seen as more expensive workers. Women may take pregnancy leave and it remains uncertain whether they will return after the birth of their child. This could, of course, also happen with a male employee, but in practice this does not occur very often. That is why employers will still try and use the argument of cost as a justification for not employing women and women of fertile age in particular.²³⁴ They justify sex discrimination arguing that substantive equal treatment is not compatible with the functioning of a free market.

The researchers find it desirable and necessary that paid and unpaid labour be distributed equally between women and men and that family responsibilities of employees are fully taken into account. Men should be encouraged to actually do their share of family duties. One way of accomplishing this would be to make paid flexible work more appealing and feasible in as many professional sectors as possible, so that men will for example work part-time and have more time for unpaid work. This can be achieved, for instance, by applying the principle of equal treatment regarding professional activities, which will be further discussed when dealing with Article 118c, paragraph 2. This way, more paid labour would become available for women, this phenomenon could be stimulated by positive action (see Article 118c, paragraph 3). There must also be a possibility of farming unpaid work out to others.²³⁵ Sharing family and employment duties increase the potential working force, lead

²³⁰ K. Wentholt, 'Het gelijkheidsbeginsel: met recht (e)en zorg', an article written in connection with the theme afternoon "Zorgtaken:who cares?" organized by the working group 'Vrouw en Recht' of the Law Faculty in Groningen, p. 5.

²³¹ K. Wentholt, 'Het gelijkheidsbeginsel: met recht (e)en zorg', *loc. cit.*, p. 3.

²³² OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 20.

²³³ Naar een emancipatoir Europees sociaal beleid, Advies Groenboek Europees sociaal beleid of the Emancipatieraad, *loc. cit.*, p. 25.

²³⁴ H. Fenwick and T. Hervey, Sex equality in the single market: new directions for the European Court of Justice, *loc. cit.*, p. 447.

²³⁵ The Commission also argues in favour of a new social infrastructure for supporting households and families, in: European Social Policy; Future action for the Union, a White Paper, Brussels, 24-7-94 Com (94) 333, fin., p. 46. The Recommendations of the Economic and Social Committee on the proposal for a Sixth Directive 92/85/EEC, clearly indicate that the proposal should be linked to or be supplemented by guidelines and measures to promote better child care facilities, so that mothers after

to better use of "human capital", promote equality of the sexes and improve the standard of living.²³⁶ The OECD report suggests the term 'labour' is to cover both paid and unpaid work. 'Total working time' in this view should comprise the time spent on paid labour as well as the time used for family responsibilities and house keeping.²³⁷

Member States' opinions, on the achievement of combining paid and unpaid labour, vary widely. Paragraph 1.5.1. discussed how socio-economic circumstances and traditional ideas about the desirability of farming out various care tasks differ strongly from Member State to Member State. Member States that have made progress in taking measures for combining family responsibilities with paid employment, can serve as examples for other Member States that have not yet reached that level. For this reason, researchers prefer to formulate a programmatic provision rather than a clause prescribing precise obligations for Member States. However, we would like to suggest some ideas on a better combination of paid and unpaid labour.

In the first place, there are measures that stimulate the redistribution of family care responsibilities between women and men. Within this category fall, for example: better terms of employment in flexible contracts, in particular part-time contracts (this was discussed in detail in Paragraph 1); a statutory right to forms of paid family-care leave, leave in case of calamities and child birth leave for fathers. In this context, the OECD report suggests the possibility of temporarily stopping work because of family responsibilities, or the right to work temporarily on a part-time basis, while keeping the option open to return to full-time work at a later stage.²³⁸ It must be noted that such measures should be framed so as to encourage both women and men to make use of them, since they can have a stigmatizing effect if only women take advantage of them.²³⁹ Other suggestions are protecting employees against working hours that impede the combination of paid and family duties and a general reduction of working hours. The European Community can provide incentives, for instance by compensating companies that reach agreements on reduction of working hours and re-allocation of jobs or conduct research to eliminate difficulties relating to work-schedules.²⁴⁰ School and working hours must be synchronised more systematically.²⁴¹ In schools it should be emphasized that boys must prepare themselves for family-care duties in later life.

their pregnancy can continue to work and are not obliged to stay at home. See OJ C-41 of 18-12-91, 29 (31) remarks concerning Article 5 of the draft directive. This remark was reflected in the Council Recommendation on child-care facilities. (Council Recommendation 92/241/EEC of 1-3-92 on child care OJ L12 of 8-5-92, 16).

²³⁶ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 19.

²³⁷ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 21.

²³⁸ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 11. Also see Council Resolution of 7 Juni 1984 on action to combat unemployment amongst women. In this Resolution greater flexibility in work times is advocated, OJ C 161/6, 21-6-1984.

²³⁹ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 20.

²⁴⁰ Response to the Groenboek Europees Sociaal beleid, Opties voor de Unie, Van de Europees Vrouwen Lobby Nederland, supported by WEP-International, *loc. cit.*, p.2.

²⁴¹ Naar een emancipatoir Europees sociaal beleid, Advies Groenboek sociaal beleid van de Emancipatie, *loc. cit.*, p. 26.

In the second place, measures can be conceived that allow unpaid family responsibilities to be farmed out. Possible measures are: expanding day care facilities (possibly the Council recommendation on child-care facilities²⁴² could be translated into a directive and criteria could be inserted for a minimum capacity of facilities per Member State), extra-curricular school facilities²⁴³ and an increase in the number of nursing homes and homes for the elderly. Furthermore, fiscal and financial instruments could be deployed to improve the social infrastructure in these fields.

The fact that the proposed Article 118c, paragraph 1, has been phrased in a programmatic form, does not mean that Member States can put off these measures indefinitely. They are supposed to start taking measures immediately, ensuring that women and men are able to participate in the labour market on an equal footing. "Useful and necessary" measures do not only include legislative provisions, but administrative, economic, social and educational measures as well.²⁴⁴ In view of the programmatic character of paragraph 1, its formulation closely follows the various Articles of the European Social Charter.

Paragraph 2

Women are often expected to do different things than men. Women are still seen as the ones primarily responsible for unpaid family tasks. This causes them often to choose working conditions which enable them to combine work with care duties, *i.e.* part-time work, working at home, or contracts of specific duration. The disadvantage is that such work is done under worse terms of employment than standard contracts. Disadvantages of this kind have been dealt with in Paragraph 1.4.4. of this chapter. By having the principle of equal treatment of women and men apply to occupational activities, indirectly other types of work that do not fall within the scope of standard contracts are also protected²⁴⁵, as women are overrepresented in precisely these types of paid labour. Unequal treatment of part-time workers and full-time employees often leads to indirect discrimination. An appropriate legal status of these types of work can prevent this. Furthermore, the negative stigma attached to flexible contracts, such as part-time contracts (badly paid jobs with practically no chance of promotion) must be eliminated. This means special attention must be paid to part-time work in sectors this has not been the case, *i.e.* industry, transport and executive corporate positions.²⁴⁶

Judgements such as in the *Helmig* case cannot be prevented by the proposed clauses, but they can lead to part-time work being accepted in all sectors of the labour market. This might induce the Court to change its view that "normal" working hours necessarily means 40 hours per week.

²⁴² Council Recommendation 92/241/EEC of 31 March 1992, OJ L 123/16, 8-5-1992.

²⁴³ Onbetaalde zorg gelijk verdeeld, Toekomstscenario's voor herverdeling van onbetaalde zorgarbeid, *loc. cit.*, p. 76.

²⁴⁴ Limburg Principles, *loc. cit.*, nos. 16 and 17.

²⁴⁵ This is advocated in the Draft Council Directive on the promotion of employment and the protection of part-time work and labour contracts of limited duration, Bonn, 29-3-94. In this context also see the opinion of the Commission in: European Social Policies, Future action for the Union, a white paper, *loc. cit.*, p. 45 and Draft Report of the European Parliament 25-1-96, *loc. cit.*, p. 3. This report states, *inter alia*, that Article 119 should be extended to all aspects of economic and social life.

²⁴⁶ OECD report; Shaping Structural Change, the role of women, *loc. cit.*, p.34.

The second advantage of an improved legal status of flexible employment is that people who wish to work shorter working hours, or prefer working at home, will not have their social protection and terms of employment deteriorate.²⁴⁷ This would encourage persons, in particular men, who up till now were not keen on flexible contracts, because of the inferior terms of employment to take up such work and choose jobs that might enable them to combine work with family duties. If the majority of working persons start working part-time, there is more time for family responsibilities. This results in a better redistribution of paid and unpaid labour. In addition, that, there are economic advantages to part-time work. Inasmuch as part-time workers are in many cases more productive than full-time workers, the quality of production can be improved. Part-time work can completely or partially prevent redundancies. Furthermore, it prevents persons, especially women, from having to stop working altogether for a long period of time, because they cannot combine a full-time job with family duties. When it turns out later that these people are needed again, they need to be retrained, because they were away from professional employment for a long period of time. This means a loss of experience due to a considerable interruption of their participation in the labour market. To put it briefly: the mobility and flexibility of the labour market are enhanced by seeing to it that people do not withdraw from the labour market for too long.

The phrase "ensure and maintain" has been taken from Article 119 of the EC Treaty. Case law on Article 119 has shown that this phrase imposes clear obligations on Member States. The words "chances of promotion, vocational training and terms of employment" are also used in the second Directive.²⁴⁸ The addition of the words "labour relations, in particular terms of employment" has the effect that not only standard contracts, but flexible contracts as well fall within the scope of this Article. Furthermore, the proposed Article not only refers to Member States, but also to the Community, *i.e.* the institutions of the Community.

Paragraph 3

The inferior position that women often are in, as compared to men, cannot be remedied by non-discrimination legislation alone.²⁴⁹ Even in countries where women have an equal share in paid labour (as in Sweden), segregation still exists as far as types of job are concerned.²⁵⁰ This is sometimes also called occupational segregation.²⁵¹ In paragraph 1.4.1., we discussed feminization of certain categories of jobs and the disadvantages attached to this phenomenon. Like their choice of certain employment contracts, women's choice of certain jobs is closely interrelated with their traditional tasks. Traditionally, "female jobs" are often the only jobs that offer the possibility of combining tasks, mainly

²⁴⁷ European Commission, Growth, competition, employment in the 21st century: means and challenges, *loc. cit.*, p. 159.

²⁴⁸ Council Directive 76/207/EEC of 9 February 1976.

²⁴⁹ Council Recommendation 84/65/EEC of 13 December 1984, on the promotion of positive action for women, OJ L 331/34, 19-12-1984.

²⁵⁰ See on this subject also: work document on the implementation of equal rights for women and men in the civil service of the Committee on Women's Rights, Rapporteur: Jessica Larive, 10 January 1996, DOC-NE/DT/283/283237, EP 214.932, p. 2.

²⁵¹ 'Reconciling work and family', in: News from the foundation, no. 43 (1994). Published by the European Foundation for the improvement of living and working conditions.

done by women in paid employment.²⁵² Occupational segregation obstructs the easy flow of work from surplus to shortage sectors contributing to unemployment, uneconomic use of qualifications in the short term and lacunae in the long run.²⁵³ It is necessary therefore to take special measures for women with regard to labour in order to eliminate their disadvantaged position. Women who are underrepresented in certain job sectors, could then receive favourable treatment until they are no longer the minority.²⁵⁴ The inferior position of women in the labour market often has its effects earlier on in their choice of education. Due to economic restructuring, in many European Countries a considerable loss of jobs can be observed. This loss especially affects unskilled workers, many of which are marginally trained elderly women with few qualifications. Women frequently miss out on in-house vocational training, due to the fact that training is often allotted on the basis of seniority and qualifications. Employers tend to take the view that they do not invest in the training, education and promotion of senior employees and women, because their career expectations promise insufficient returns on such investment.²⁵⁵ This attitude, however, must be rejected. Vocational training is essential to acquire and maintain a qualified labour force. Women who are excluded from this type of training, are very likely to be ultimately shut out of the labour market altogether.²⁵⁶ Through affirmative action, women can be encouraged to choose those jobs and forms of education that will offer them more opportunities for the future.²⁵⁷ Participation of women in follow-up training and other courses can be increased by creating new types of courses. In order to facilitate access of women to these courses, place, time and duration should be geared to the needs and wishes of women. Women must be stimulated to continue their education, especially when they are temporarily inactive in the labour market. This way, their knowledge will remain up-to-date and they will be able to re-enter the labour market more easily, should they wish to do so.²⁵⁸ Finally, women are still not sufficiently involved in decision-making procedures, because they are underrepresented in those bodies in which decisions are taken. For this reason, programmes must be developed encouraging women to participate in important decision-making procedures.²⁵⁹ The decision-making bodies themselves must pay more

²⁵² Naar een emancipatoir Europees sociaal beleid, Advies Groenboek sociaal beleid van de Emancipatieraad, *loc. cit.*, p. 31.

²⁵³ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 24.

²⁵⁴ Also see Limburg Principles, *loc. cit.*, no. 9.

²⁵⁵ A decision by the Nederlands Centrale Raad van Beroep opens the way for a real verification of the human capital argument CRvB 25-3-93, TAR (Magazine Labour Law) of 93.99.

²⁵⁶ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, pp. 26-27.

²⁵⁷ See also Council Resolution of 12-7-82 on the promotion of equal opportunity for women, which confirms that women should be proportionally represented in all sectors and at all levels of the labour market OJ C-186/3 12-7-82, and Council Resolution 85/C 166/01 of 3-6-85 on the promotion of equal opportunities for girls and boys in education OJ C-166/2, 5-7-85 and Commission Recommendation 87/567/EEC of 24-11-87 on vocational training for women OJ L342/85, 4-12-87. Also OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 25, and Council Resolution 84/C 161/02 of 7-6-84 which argues that measures are needed in order to lower the high rate of unemployment among women, since unemployment among women is considerably higher than among men, OJ C-161/6, 21-6-84.

²⁵⁸ Equally, Council Resolution 88/C 333/01 on the reintegration and late integration of women into working life, OJ C 333/01.

attention to the interests of women.²⁶⁰

A positive action policy in the European Community could be organized in various ways. Legislation is an obvious choice. To prevent confusing judgements such as the *Kalanke* judgement, the terms for positive action should be laid down in a directive. The following provisions could be considered:

1. Disadvantage must be observed according to every type and level of employment. The disadvantage is determined by comparing the share that women have in specific jobs at a particular level to the relevant potential supply of women in the labour market;
2. the degree of preferential treatment must be established for every type and level of position, what degree of positive action is most appropriate;
3. preferential measures must be proportional to the disadvantage demonstrated: a proportionality check;
4. when a vacancy is published, it must expressly state that preferential treatment of women applies. Research has shown, however, that, although legislation plays a role as to the legitimacy of a specific measure, it is not the only motivating factor for companies to have a policy of positive action.²⁶¹ In a report on "Motivating factors, Obstacles and Guidelines" the following is pointed out: "The main motivating factor is the contribution of a Positive Action scheme to better management of human resources as an integral part of company strategy. Men and Women use and combine their abilities more effectively in mixed groups. Furthermore, qualitative changes in work and management styles, resulting from the cooperation of women and men as equal partners at all levels of the hierarchy, will occur. The lack of financial incentives (subsidies, tax exemptions, funding) given to companies for implementation of a Positive Action plan represents an obstacle, this is a reason for adopting a system of financial incentives. For example, financially supporting companies that recruit women for jobs normally done by men."

Another motivating factor is the favourable image a firm or institution can derive from applying a positive action policy, which in turn can have a positive influence on the recruitment of new employees and on female consumers who buy the products or services offered by such establishments.²⁶²

The White Paper recommends the introduction of minimum standards for the (re)integration of women into the labour market. Member States would then have to meet these minimum norms if they wish to be eligible for Community subsidies (for example subsidies to firms or institutions, that

²⁵⁹ See also Council Resolution 86/C 20/02 of 24 January 1986 on the promotion of equal opportunities for women, which also argues in favour of stronger participation of women in the public and private sector, particularly in decision-making bodies, OJ C 20/02 12-8-86 and Council Recommendation 84/65/EEC of 13-12-84 on positive action for women, OJ L 31/4, 19-12-84, and finally Council Resolution 95/C 168/02 of 27 March 1995 on proportional participation of women and men in decision-making, OJ of the EC, no. C 168, 4-7-1995.

²⁶⁰ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 40.

²⁶¹ T. Loenen and A. Veldman, 'Van voor naar achter, van links naar rechts? Voorkeursbehandeling na Kalanke', NJB 24 November 1995, edition 42, p. 1527. The terms of application were borrowed from the judgement of the Nederlandse Commissie Gelijke Behandeling, judgement of 9 July 1990, no. 56-90-33.

²⁶² Positive Action Network. Motivating factors, obstacles and guidelines, Commission of the EC, Equal Opportunities Unit-DG V.B.4. V/1604/92-EN.

employ a certain number of female workers).²⁶³ Another option would be favouring establishments with a good positive action record, at tenders.

In Paragraph 1.4.3. we have already stated our objections against the *Kalanke* case. The decision in this case has caused us to suggest the insertion into the EC Treaty of an article, which establishes beyond any doubt the possibility for Member States and private parties to take positive action measures²⁶⁴. In the proposed Article, positive action is not seen as an exception that needs express justification, but as the consequence of a rule, namely the rule of equal treatment which must lead to actual equality. Measures within the framework of positive action counteract the disadvantages established for a certain group. So, in fact the principle of equality is applied. This line of reasoning is not of a purely theoretical importance, but also leads to a practical difference, namely that in certain circumstances the principle of equality requires unequal treatment proportional to the disadvantage established.²⁶⁵

The Agreement on Social Policy contains a clause upon which specific measures favouring women can be based. However, the scope of this article is rather limited. It only covers pay, whereas the article as drafted by us also relates to, for example, access to the labour market and to vocational training. The objective, after all, is to eliminate the actual underrepresentation of women in certain sectors of employment and training. In that case, a positive action policy may have many facets.²⁶⁶

Under the proposed Article, positive action measures can be taken by Member States, as well as by firms or establishments and by the institutions of the European Community. If the European Community wishes to be taken seriously in the field of equal treatment presentin itself as the driving force behind the improvements within Member States, it will have to make sure that these problems are dealt with appropriately within its own services.²⁶⁷

Paragraph 3 is a combination of Articles 6, paragraph 3, of the Agreement on Social Policy and Article 4 of the Convention on the elimination of discrimination against women.²⁶⁸

²⁶³ Europese Commissie, Groei, concurrentievermogen, werkgelegenheid, naar de 21e eeuw: wegen en uitdagingen, *loc. cit.*, 162.

²⁶⁴ Draft Recommendation 10-1-96, *loc. cit.*, p. 5: "The Court of Justice's verdict in the *Kalanke* case has made clear that in the Treaty the possibility for positive action to promote equality of women and men must be opened, the accent having to be laid on equality of results rather than on strict equality in each individual case".

²⁶⁵ A. W. Heringa, 'Voorkeursbehandeling en moederschap', in: *Het Vrouwenverdrag: een beeld van een Verdrag...* Antwerpen-Apeldoorn, MAKLU Uitgevers, 1994, p. 41.

²⁶⁶ In this context, see also the Draft Report of the European Parliament which argues that in areas where shortages are observed positive action must be promoted, 25-1-96, *loc. cit.*, p. 3.

²⁶⁷ Work document of 10 January 1996, *loc. cit.*, p. 3.

²⁶⁸ Article 6 of the Agreement on Social Policy reads as follows:

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work is applied.
2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in

Paragraph 4

Paragraph 4 is a *lex specialis* of Article 6a, paragraph 2.

Social Security

Proposed Article 119a of the EC Treaty

Explanatory notes

Paragraph 1

Social security measures tend to differ from one type of employment contract to another. Flexible contracts often have worse terms of employment than standard contracts. As more women than men work under flexible contracts, the women are the ones affected by these differences. The level of or the entitlement to certain welfare payments is also frequently related to the career record of the applicant. The career record of women tends to be shorter than that of men with all the concomitant negative consequences.²⁶⁹ A provision imposing equal treatment between women and men in social security can prevent this. In paragraph 1.4.5., the question of whether women and men should be treated equally with regard to retirement benefits, remained without a clear answer. Researchers think it important therefore that the principle of equal treatment in social security be expressly included in primary Community legislation. In order to realize the principle of equal treatment in social security discussed in Paragraph 1, the proposal for amendment to the Third Council Directive must be

respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement,

b) that pay for work at time rates shall be the same for the same job.

3. This Article shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers.

Article 4 of the Convention on the elimination of discrimination against women reads:

"1. Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

²⁶⁹ Case C-8/94, Court of Justice of 8 February 1996 (*Laperre-Bestuurscommissie beroepszaken in de Provincie Zuid-Holland*), dealt with a woman not entitled to an allowance, on the basis of the IOAW, because of certain requirements relating to the career record. She claimed this was a case of indirect discrimination, because women could meet the requirements less often than men. The Court held that this was not a case of indirect discrimination, because the national legislator could prove that the clause at issue, was indispensable for achieving an objective of social policy not related to sex discrimination.

adopted.²⁷⁰

Paragraph 2

Social minimum standards must be incorporated in legislation, offering protection against illness, invalidity, old age, occupational accidents, occupational disease and unemployment, as well as social security measures that supplement or replace these measures. Social minimum standards must also be included in company and sectorial measures, as specified by the Fourth Council Directive of 24 July 1986. The creation of social minimum standards will be of special advantage to women, as they constitute the majority of those who economically speaking find themselves at the bottom of the ladder.²⁷¹

The starting point should be that income from social security measures must secure an independent and full-fledged basis for subsistence. Common indicators to determine the cost of living in the various Member States need to be developed.²⁷² The formulation of minimum standards is a lengthy process: Member States can use this argument as an excuse for continually postponing or delaying legislation. In any case, Member States must immediately begin formulating such minimum standards and strive for speedy implementation.²⁷³ As soon as there is a minimum standard it must be applied by all means available. Member States must guarantee their citizens a certain minimum standard, irrespective of their levels of economic development and resources. The phrase "all means available" includes the resources available in Member States and those offered by the international Community through cooperation and aid. There must be regular checks as to whether a Member State is effectively using all available resources.²⁷⁴

By mentioning statutory and occupational social security, paragraph 2 links up with the relevant directives in this field.²⁷⁵ The phrase on harmonization is based on, among others, Article 118a, paragraph 1, of the EC Treaty.

Paragraph 3

This clause is also a *lex specialis* of our proposed Article 6a, paragraph 2.

²⁷⁰ Proposal for a Council Directive with a view to amending Directive 86/378/EEC, Com(95) 186 fin., OJ C 218, 2-8-1995. The advice given by the Economic and Social Committee on the 26 October 1995 was positive.

²⁷¹ Council Resolution 94/C 368/03 of 6 December 1994 also advocates the development of social minimum standards. The Council proceeds as follows: "Minimum standards constitute an appropriate instrument for achieving economic and social convergence gradually, while respecting the economic capabilities of the individual member states. They also meet the expectations of workers in the European Union and calm fears about social dismantling and social dumping in the Union." Official Journal of the EC no. C 68, 23-12-1994.

²⁷² Reaction to the *Groenboek Europees sociaal beleid* by the Europese Vrouwenlobby, *loc. cit.*, p. 12.

²⁷³ Identical to the Limburg Principles, *loc. cit.*, nos. 16 and 21.

²⁷⁴ Limburg Principles, *loc. cit.*, nos. 25-27.

²⁷⁵ See Council Directives 79/9/EEC of 19 December 1978 and 86/378/EEC of 24 July 1986.

2.3. Implementation

2.3.1. General Remarks

In 1981, the Commission took the decision to create an Advisory Committee on Equal Opportunities for Women and Men.²⁷⁶ The Advisory Committee advises the Commission in formulating and implementing Commission policy to further equal treatment of women and men. For this purpose, the Committee exchanges information with the Commission about actions that are undertaken at Community level or within the Member States. Furthermore, the Advisory Committee, at the request of the Commission or on its own initiative, drafts reports and exchanges information about Member States' experiences with equal treatment policies.²⁷⁷ Notwithstanding the work of this Committee, Community legislation is still insufficiently implemented by Member States. Directly applicable provisions can be invoked by individual citizens before the European Court. Also national courts are obliged to interpret national law in the light of Community legislation. The researchers would like to suggest some other methods of implementing Community legislation in the field of equal treatment of women and men.

2.3.2. Adapting National Regulations as a result of the Case Law of the Court of Justice

At regular intervals, Member States should adapt their legislation to be in step with the developments in case law. This still does not happen enough. The following are suggested as ways to put an end to the current situation:

- action by the European Commission (by virtue of Article 169 of the EC Treaty)
- test cases brought before the Court of Justice from the Member States (preliminary questions ex Article 177 of the EC Treaty). This can be stimulated by the Commission through a test-case project. In such a project, the Commission makes a country-by-country inventory of the existing state of affairs, checking as to whether test-cases have already been brought before the domestic courts, there are financing facilities, legal counsel, a proper follow-up both from a publicity and a policy-making point of view? Per country, a specific approach can subsequently be developed to stimulate test procedures with regard to equal treatment and proper follow-up. Examples of specific actions are (depending on each national situation):

- * making contact with solicitors who may be prepared to take on such cases by supplying them with the necessary information and training;
- * setting up a fund for test cases;
- * selecting the right issues and persons to institute legal proceedings in test cases with the help of intermediaries;
- * setting up (with the help of relevant intermediary organizations) a publicity campaign for the test case;
- * setting up (with the help of relevant intermediary organizations) a lobbying framework to integrate the outcome of the test case - if positive - into the public policies.²⁷⁸

2.3.3. Setting up a Committee of Experts

²⁷⁶ Commission Decision 82/43/EEC of 9 December 1982, OJ. L 20/35, 28-1-1982.

²⁷⁷ Article 2 of Commission Decision 82/43/EEC.

²⁷⁸ J. Sjerps in his discussion paper on the fourth action programme on equal opportunities, 13-4-95, The Hague, Information Bureau of the European Parliament.

Blanpain furthermore suggests to set up a Committee of Experts in order to guarantee proper implementation of Community legislation in the field of social policy, which is to include measures regarding equal treatment of women and men.²⁷⁹ Experts are to sit on the Committee in their individual capacity and not as representatives of the Member States. They should be independent personalities, widely renowned for their competence in national and international social policy questions. An expert from the Council of Europe or the International Labour Organization could be a member of the Committee, in order to ensure consistency in the interpretation of fundamental social rights.

The researchers suggest the following tasks for the Committee of Experts:

- studying annual reports on the social situation in each Member State and reviewing the extent to which the rights as proposed in the present report are implemented in Member States. Government reports should be clearly written and as detailed as possible. For this purpose, Member States must make the necessary administrative provisions, such as the making available of statistical data that are an indicative of the degree to which certain rights have become a practical reality.²⁸⁰ Information contained in the reports must not only emanate from government agencies. Non-governmental organizations, both national and international must also be allowed to supply data. In this context, 'relevant organizations' refers to women's organizations, employers- and trade unions, as well as to more general human-rights organizations. In drawing up these reports governments have the opportunity to verify the extent to which their policies constitute a proper implementation of EC legislation. Member States should, where possible, mention clear targets and indicators for the implementation of the EC Treaty provisions.²⁸¹ Through these indicators it can be determined whether, in a particular period of time, the status of women has improved or rather deteriorated. National committees and organizations dealing specifically with women's affairs should cooperate closely with those who are engaged in developing these indicators.²⁸² Furthermore, the reports by Member States should state clearly where more progress could be achieved.²⁸³ The Committee can play a supportive role for the Member States in drawing up their reports. It is important to see to it that clear guidelines exist for drafting these reports, so that the Member States know exactly what is expected of them.²⁸⁴ The Committee could also invite Member States to provide an explanation of their report, so as to bring about a constructive dialogue between them;²⁸⁵
- Verifying the extent to which Member States fulfill their Treaty obligations and publishing a report containing the conclusions drawn from their findings;
- Formulating suggestions and recommendations to Member States for improved implementation of

²⁷⁹ R. Blanpain and others, *Fundamental social rights: proposals for the European Union*, *loc. cit.*, pp. 15-16.

²⁸⁰ D. Harris, 'Commentary by the rapporteur on the consideration of states' parties reports and international cooperation,' in: *Human Rights Quarterly*, vol. 9, 1987, p. 43.

²⁸¹ Limburg Principles, *loc. cit.*, nos. 74-79.

²⁸² OECD report: *Shaping Structural Change, the role of women*, *loc. cit.*, p. 43.

²⁸³ Limburg Principles, *loc. cit.*, no. 81.

²⁸⁴ Limburg Principles, *loc. cit.*, no. 87.

²⁸⁵ Limburg Principles, *loc. cit.*, no. 88.

provisions of Community law;

- Receiving complaints from trade unions and employers organizations and other bodies regarding violations of relevant articles of Community law and reporting on such cases;
- Formulating suggestions and recommendations to the Commission and to the Court of Justice, for instance about the efficiency of the reporting procedure or about the meaning and scope of the rights mentioned in the present report;
- The rights as proposed in this report are not to be seen as static; they can change in the light of social and economic developments. The Committee can play an important role in the interpretation of provisions which in turn can be a basis for the work of the Court of Justice;²⁸⁶
- Analysing causes and factors inhibiting the realization of rights and, where possible, suggesting solutions to the problems identified;²⁸⁷

The Commission must see to it that the Committee can function properly. In practical terms this means that the Committee must be able to meet regularly in order to study Member States reports. Adequate secretarial and other facilities must be made available to the Committee. The Committee could divide tasks internally. Thus, a number of members could concentrate on formulating suggestions and recommendations. Others could specialize in drawing up reports on particular subjects and on drafting proposals for economic and technical assistance to Member States so as to allow them to better meet their obligations.²⁸⁸ Finally, close cooperation will have to be sought also with other international organizations with a view to improving the status of women worldwide. No doubt the Committee can draw on from the experience of other comparable bodies regarding the interpretation of specific rights and obligations. In this context, the CEDAW springs to mind. Regular consultation should take place between the Committee and other specialized bodies regarding common problems.²⁸⁹ Efforts to improve the position of women in the Community will not be effective if in the rest of the world women are still primarily seen as a source of cheap labour. A more far-reaching international cooperation will be needed to enhance the economic status of women at the international level.²⁹⁰

2.4 Summary

How did the researchers deal with the bottle-necks identified in chapter 1?

- Direct and indirect discrimination is prohibited in the proposed Article 6a of the EC Treaty. This article also postulates the principle of equal treatment of women and men. The result to which this provision must lead is formulated in the proposed amendment to Article 3 EC Treaty. The words "actual equal treatment" used in the amendment imply a substantive approach to equality;
- So as to facilitate proof of discrimination, a directive is required which regulates the shifting of the burden of proof;
- The proposed amendment to Article 100a of the EC Treaty offers more scope for adopting measures in the field of social policy, including those concerning equal treatment of women and men in the

²⁸⁶ R. Blanpain and others, Fundamental social rights: proposals for the European Union, *loc. cit.*, p. 15-16.

²⁸⁷ Limburg Principles, *loc. cit.*, no. 12.

²⁸⁸ Limburg Principles, *loc. cit.*, nos. 83-85.

²⁸⁹ Limburg Principles, *loc. cit.*, nos. 92-96.

²⁹⁰ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 44.

work process, by qualified majority voting;

- The proposed Article 118c, paragraph 1, encourages the Community and Member States to adopt measures to facilitate the combination of paid work and family responsibilities. This can be done in two ways. First, by means of care leave and the extension of day-care facilities for children and the elderly; or by equal treatment of women and men in respect of occupational activities. The latter is taken care of in paragraph 2 of Article 118c. The proposed Article 118c, paragraph 2, of the EC Treaty implies an upgrading of flexible contracts, making it more attractive to enter into such contracts. This may lead to bringing about a more balanced distribution of paid and unpaid work between women and men;

- In Paragraph 3 of the proposed Article 118c, of the EC Treaty positive action is permitted, which is a further elaboration of the substantive equality approach;

- The proposed Article 119a of the EC Treaty stipulates that the principle of equal treatment of women and men must be applied in social security. Furthermore, Paragraph 2 of the proposed article obliges Member States to develop social minimum standards;

- Actions by the Commission ex Article 169 EC Treaty and test cases before the courts could compel Member States to adapt their legislation to EC case law. Furthermore, a Committee of Experts could be set up whose task it would be to study annual reports from the Member States and to verify the extent to which these countries comply with the obligations relating to the equal treatment of women and men. The Committee could also hear complaints from non-governmental organizations operating in this field. In order to improve the status of women worldwide, close cooperation with other international bodies is called for.

Chapter 3

A glance into the future

3.1. Possible developments

In view of the forthcoming Intergovernmental Conference (IGC), this chapter will outline a number of developments in the social policy of the Community, equal treatment policy being one of them. Researchers feel that the position of women in the Community is best served with the adoption of the proposals to amend the EC Treaty, as defined and discussed in Chapter 2. There are, however, a number of other possibilities. These will briefly be discussed in this chapter. In addition a number of measures based on the proposals in Chapter 2 will be described in the form of an action programme.

Option 1:

Incorporating the Agreement on Social Policy into the EC Treaty.

The United Kingdom will eventually become a party to the Agreement on Social Policy and the Agreement is incorporated into the EC Treaty.²⁹¹ The Agreement then becomes Community law, applicable in all Member States. The Agreement, however, has a few negative aspects. First of all, there is a lack of democratic control over measures taken on the basis of the Social Agreement. Community institutions have little influence on the decision-making by social partners as provided for in Article 4 of the Agreement. By virtue of this article, social partners can enter into agreements among themselves. If social partners wish to implement by way of a Council decision²⁹² an agreement reached between them, neither the Commission nor the Council can influence the contents of such agreements. The Council may, of course, refuse to take the decision to implement the agreement.²⁹³ The European Parliament has no influence whatsoever over this decision making process and over whether social partners reach an agreement or not. The researchers must therefore hope that the model of the Social Agreement does not degenerate into a pattern of "corporatism" in which the social partners have a disproportionately strong influence on social policy. In Member States with a low degree of worker organizations, as in France, this also raises the question of "representativity".²⁹⁴ If a small number of workers are members of trade unions, only a minority of the work force will be represented by the social partners.

A second drawback of the Social Agreement is the representativity of the social partners as such. They

²⁹¹ The Draft Report of the European Parliament urges that the Social Protocol be annexed to the EC Treaty. Draft Report, 25 January 1996, *loc. cit.*, p. 3. The Commission on Women's Rights shares the majority opinion in the Reflection group according to which the Social Protocol should be incorporated into the Treaty as an essential step towards creating a social Europe to counter-balance to economic and monetary integration. Thus the Draft Recommendation of 10 January 1996, *loc. cit.*, p. 4.

²⁹² Article 4 paragraph 2 of the Agreement on Social Policy.

²⁹³ P. Watson, Social Policy after Maastricht, *loc. cit.*, p. 4.

²⁹⁴ W. Devroe and J. Wouters, De Europese Unie, Het Verdrag van Maastricht en zijn uitvoering: analyse en perspectieven, *loc. cit.*, p. 468.

only represent those who have managed to obtain a place in the labour market. Participation of women in the labour market however still lags far behind that of men.²⁹⁵ Moreover, women are often underrepresented in employees- and labour organizations, even if they do have paid employment. They are also inadequately represented in the positions within these organizations where the decision-making actually takes place. Furthermore, many women work under flexible labour contracts that often fall outside the scope of the negotiating process.²⁹⁶ Also in this respect, the interests of working women are inadequately defended.

In view of the above-mentioned disadvantages, who seek effective social policies, the researchers prefer an amendment to the EC Treaty by incorporating the Social Agreement into it, unless a wider definition of the concept of "social partners", covering a wider range of representative institutions can be found. The latter has been suggested in the OECD report.²⁹⁷ The researchers feel that decisions in the field of equal treatment must be first and foremost taken by the Council. If this proves to be impossible, the social partners could agree on the subject, providing the European Parliament may exercise its influence on decisions taken by the Council to implement such agreements between social partners at Community level. Finally, proportional representation of women in employee and labour organizations must be thought about.

Option 2:

Amending the Agreement on Social Policy²⁹⁸

If the United Kingdom is not willing to join to the Social Protocol, the Social Agreement still binds all other Member States. In that case, the researchers would wish to submit a number of amendments to this Agreement in the interest of the status of women.

²⁹⁵ Women and Men in the European Union: A Statistical Portrait, *loc. cit.*, p. 134. See also: M. Snoep, Het primaat van een mannenbolwerk, emancipatie in CAO-onderhandelingen, Emancipatieraad, Den Haag, 1996; M. Braithewaite and C. Burne, Women in decision-making in the trade unions. A study of the literature and a study of the European Trade Union Confederation and its affiliated national confederation and European industry committees, Brussels, European Trade Union Confederation, 1995; E. Heery and J. Kelly, Do female representatives make a difference: women full-time officials and trade unionwork, Work, Employment & Society, 1988, vol. 2, no. 4, pp. 487-505; J. Plantenga and M. Snoep, Participation and non-participation in the Netherlands. The causes and the consequences of variations in female activity and employment rates, External report commissioned by and presented to the European Commission, Economisch Instituut Utrecht, 1995; J. Sap, 'Bargaining power and wages. A game-theoretic model of gender differences in Union wage bargaining', Labour Economics, 1993, no. 1, p. 25-48; D. Verhoeven, I. Ronner and A. van Haag, De positie van vrouwen in sociaal-economische besturen. Een exploderend onderzoek naar de rekrutering van bestuurders voor sociaal-economische belangenorganisaties, Amsterdam, RSOB, 1995; Vrouwen in Besluitvorming, Voortgangsrapportage of the projectgroep Vergroting van de deelname van vrouwen aan de maatschappelijke besluitvorming, Den Haag, Ministerie van Sociale Zaken en Werkgelegenheid, Directie Coördinatie Emancipatiebeleid, 1995.

²⁹⁶ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 42.

²⁹⁷ OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 40.

²⁹⁸ From a political angle, this option seems more feasible than the previous one given by the United Kingdom.

Changes in the Agreement on Social Policy, agreed between the Member States of the European Community, with the exception of the United Kingdom.

Article 2 of the Agreement, current text:

Proposal for Article 2 of the Agreement

Explanatory notes

The amendment is connected with the proposed amendment for Article 3 subpar. (u) of the EC Treaty.²⁹⁹ In paragraph 2, the procedure has been changed in the sense that the Council takes a decision according to the procedure of Article 189b of the EC Treaty rather than that of Article 189c. This corresponds to the proposed Articles 6a paragraph 2, 118c and 119a.³⁰⁰ Paragraph 3, Article 2 of the Agreement on Social Policy is removed in accordance with the proposed amendment to Article 100a and the proposed new Article for 119a of the EC Treaty. Paragraph 3 deals with rights and interests of workers and social security. On the basis of the proposed Articles 100a and 119a of the EC Treaty, decisions in these fields have to be taken by qualified majority.

If Article 2 were thus amended the Council could more easily take decisions regarding social policy, as a qualified majority will suffice in more instances. As a result measures in the field of equal treatment will be less frequently left to social partners.

Article 4 of the Agreement, current text

Proposal for Article 4 of the Agreement

Explanatory notes

The insertion of the procedure of Article 189b of the Treaty into Article 4 grants the European Parliament more influence on the decision-making as defined in article 4. Part of the last sentence of paragraph 2 is left out in order to be in line with the proposed amendment of Article 2. In this amendment as the Council takes decisions by qualified majority also for matters falling within the scope of paragraph 3 of the present Article 2.

Proposal for Article 6 (the current Article 6 will Article 6a)

²⁹⁹ See the explanatory notes on the amendment of Article 3 of the EC Treaty.

³⁰⁰ See the explanatory notes on Article 6a, paragraph 2, of the EC Treaty.

Explanatory notes

The proposed Article 6 of the Agreement on Social Policy is based on the proposed Article 6a of the EC Treaty. If the principle of equal treatment of women and men cannot be incorporated in the EC Treaty, it is advisable to incorporate it in to the Agreement on Social Policy.³⁰¹

Article 6

Proposal for Article 6a

Explanatory notes

Paragraph 3 has been adopted from the proposed Article 118c paragraph 3 of the EC Treaty.³⁰²

When discussing Option 1, it was stated that women are often underrepresented in employee and labour organizations. In Articles 6 and 6a, as proposed in Option 2, this problem may be remedied by positive action.

The proposed amendments to the Agreement on Social Policy will contribute to improving the position of women in the Community. It should be noted, however, that legislation on the basis of the Agreement on Social Policy does not apply to the United Kingdom of Great Britain and Northern Ireland. It is of the utmost importance that the United Kingdom will observe the Agreement, so that unfair competition between Member States can be avoided.

Option 3:
Maastricht Treaty for Women.

The legislative provisions as proposed in paragraph 2.2 could laid down in a separate treaty as was the case with the Agreement on Social Policy. In that case, a separate protocol, analogous to the Social Protocol, should be attached to the EC Treaty to enable Member States involved to implement "The Treaty for Women" with the help of the Community institutions. This option has also a negative side. The danger exists that this agreement, as the Agreement on Social Policy, could lead to social dumping. Enterprises would probably be tempted to transfer operations to the United Kingdom, where the equal treatment of women and men has a lower priority and where as a consequence production costs will be lower than in the rest of the Community. In that case, rather than serving as basis for a

³⁰¹ See the explanatory notes on the proposed Article 6a of the EC Treaty.

³⁰² See for more information on this paragraph, the explanatory notes of the proposed Article 118c, paragraph 3, of the EC Treaty.

just policy of equal treatment at Community level, the agreement could degenerate into an instrument to lower the existing norms regarding equal treatment of women and men.³⁰³ Policies aimed at improving the status of women at Community level are therefore to be preferred over drafting a separate agreement, which would probably only exacerbate the existing differences between the United Kingdom and the rest of the Community.

3.2. Action Programme "Beyond 2000"

In this paragraph, the researchers intend to outline possible measures for the future that will promote a gender-neutral society, in which paid and unpaid labour is equally divided between women and men. Below, a number of suggestions on taking specific measures in various fields are briefly mentioned. These suggestions build on the proposals made in chapter 2.

Labour

- * general reduction of working hours (for instance a 30-hour work week)
- * development of schemes that enable workers to take "sabbatical" leaves without negative consequences for their career.
- * co-deciding working hours (flexi-time)
- * a right to part-time work
- * compulsory application of gender-neutral job classification schemes by employers
- * promotion of the interests of workers on flexible contracts in collective bargaining
- * development of a modern system of gender-neutral job-analysis and description³⁰⁴

Social development of infrastructure

- * individualisation of fiscal systems³⁰⁵
- * abolishing the breadwinner model as a standard for taxation and social security rights³⁰⁶ * at the present the notion of shared income is too often the basis for assesment. Social security schemes must be adapted to correspond to the changing structure in particular by way of individualisation of social

³⁰³ See also P. Watson, Social policy after Maastricht, *loc. cit.*, p. 512, who objects to this argument when discussing the Agreement on Social Policy.

³⁰⁴ This could lead to better appreciation and pay for work predominantly done by women, which would diminish the degree of occupational segregation. The criteria as formulated in the *Rummeler/Dato* case described in paragraph 2.4.2. could be used as guidelines drawing up a job classification scheme. A job classification scheme can help determine in a specific situation whether is work of equal value. Employers could be forced to work with such job classification schemes. The Commission on Women's Rights in her draft recommendation of 10 January 1996, (*loc. cit.*, p. 5) argues as follows: "The objectives, as stated before, must imply more than just equal pay for equal work as demanded in Article 119. This must be changed into equal pay for work of equal value."

³⁰⁵ This will have the result that more women will take part in the labour market. These days, if both the wife and husband have a job, the wife has a lower income than her husband. A clause on breadwinner status often forms an impediment for dependant partners (in practice mostly women) to enter the labour market.

³⁰⁶ This recommendation is also made by the Commission in: European Social Policy; Future Action for the Union, a White Paper, *loc. cit.*, p. 52 and equally by the European Women's Lobby in a reaction to the Groenboek Europees sociaal beleid, *loc. cit.*, p. 12.

security rights³⁰⁷

- * establishing criteria regarding minimum child-care facilities per Member State
- * paid care leave, such as parental leave, on social security rights during the period of absence
- * use of the media and other forms of diffusion of information to promote the acceptance of the notion that women and men, share family responsibilities and responsibilities at the workplace on the basis of equality
- * the possibility for women and men to accrue up pension rights, including during the periods of time they spend outside the labour market to take care of children, elderly or handicapped relatives³⁰⁸

Decision-making

- * implementing measures of positive action to improve direct representation of women in economic, social and political decision-making bodies
- * stimulating the creation of effective and accessible channels through which women can express their needs and worries in the decision making process
- * improving the cohesion and consistency of policies with regard to women, particularly through effective coordination of all those involved

Enforcement

- * establishing targets and time-schedules for achieving full participation of women in society
- * sanctions in case of non-compliance with these obligations

³⁰⁷ This means that if a woman is ill or out of work she often not receives any income from social security, because her partner earns too much. The question, however, is whether she has access to her partners' income. In many European Countries, taxation systems are now based on the individual. Applying the same criterion to social security provisions would enhance consistency and stimulate personal autonomy and economic independence, OECD report: Shaping Structural Change, the role of women, *loc. cit.*, p. 38. See regarding social security in the European Community: A. Byre, EC Social Policy and 1992, *loc. cit.*, pp. 206-238.

³⁰⁸ Reaction to het Groenboek Europees sociaal beleid van de Europese Vrouwen Lobby, *loc. cit.*, p. 12 and OECD report: Shaping Structural Change, the role of women, *loc.cit.*, p. 38

Concluding Remarks

A substantial improvement of the position of women in the European Union can only be obtained if the whole regulatory system of European society changes in a structural manner. To attain this objective will not be easy. It demands a change of mentality of a cultural, social and economic nature. Such a change is gradually taking place. Demands for shorter working hours, affordable child-care facilities and adequate legal protection for workers on flexible contracts clearly point in this direction. Sadly though the formal regulatory process lags behind compared to the social developments in this field. The time has come to reinforce the foundations of the European Community, so that this Community be carried forwards by women and men alike. If the regulation equal treatment is not taken on, the social and economic unification of the Community is bound to stagnate and ultimately the road to further progress will be blocked.

As stated earlier, recognition of the role women play in the economy is a precondition for safeguarding the necessary economic and social cohesion and progress in the European Community. At the moment, there is no gender-neutral society. In a gender-neutral society, as described in the 1991 OECD-report 'Shaping Structural Change', social justice (including the equal treatment of women and men) and economic efficiency can positively coexist. To achieve such a society, a number of bottlenecks have to be resolved. First, the present distribution of paid and unpaid employment between women and men is a main obstacle. Second, the position of women who are doing paid labour is often inferior to that of men. Third, social security schemes that are related to a person's labour record are not organized on the basis of equality of treatment. The number of women depending on social security schemes not related to paid employment is considerably higher than the number of men, which causes to the feminization of poverty.

At the level of the Community, some efforts have been made to tackle these problems and to improve the position of women. Unfortunately many proposals of this nature have ended in deadlock given the fact that the Council is obliged to take decisions unanimously, with regard to the equal treatment of women and men. To repair this defect a proposal has been formulated in this report to change the decision-making procedure.

This report also formulates a number of basic conditions for achieving a substantial improvement of the position of women in the European Community. It also points out the way in which the European Community could evolve and develop its policies in the realm of equal treatment of women and men in the coming decades. The report proposes a number of amendments to the EC Treaty and the Agreement on Social Policy to deal with the earlier mentioned bottlenecks. The point of departure for such proposals is the substantive equality approach and it is with this approach in mind that the proposals should be considered. In doing so, three fundamental points of departure can be distinguished. First, it is important that all discrimination of women be brought to an end. To this end, a general principle of non-discrimination and a principle with regard to the equal treatment of women and men are needed. Positive action is a means to attain the goal of actual equal treatment. Second, unpaid employment must be made more attractive for men and sufficient and affordable facilities must be provided for those who want to farm out care tasks. Third, it is desirable to develop minimum standards for social security measures not related to paid employment. Hence, to our proposed amendments for Article 3 and 100a of the EC Treaty.³⁰⁹ There also are proposals for new Articles 6a, 118c and 119a of the EC Treaty. Finally, amendments and new articles are proposed for the

³⁰⁹ See paragraph 2.2. of chapter 2.

³¹⁰ See paragraph 3.1. in this report.

List of relevant cases

1971

- Case C-80/70, Court of Justice 25 May 1971, (Gabrielle Defrenne-België)

1976

- Case C-43/75, Court of Justice 8 April 1976, (Gabrielle Defrenne-Société Anonyme Belge de Navigation Aérienne Sabena)

1978

- Case C-149/77, Court of Justice 15 June 1978, (Gabrielle Defrenne-Société Anonyme Belge de Navigation Aérienne Sabena)

1980

- Case C-129/79, Court of Justice 27 March 1980, (Macarthys Ltd.-Wendy Smith)

1981

- Case C-69/80, Court of Justice 11 March 1981, (Susan Jane Worringham en Humphreys-Lloyds Bank Limited)
- Case C-96-80, Court of Justice 31 March 1981, (J.P. Jenkins-Kingsgate [Clothing Productions] Ltd.)

1982

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- Case C-19/81, Court of Justice 16 February 1982, (Arthur Burton-British Railways Board)
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- Case C-58/81, Court of Justice 9 June 1982, (Commission of the European Communities-Grand Duchy of Luxembourg)
- Case C-61/81, Court of Justice 6 July 1982, (Commissions of the European Communities-United Kingdom of Great Britain and Northern Ireland)

1983

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1984

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1985

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1986

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1987

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- Case C-30/85, Court of Justice 11 June 1987, (J.W. Teuling-Bedrijfsvereniging voor de Chemische Industrie)
- Case C-384/85, Court of Justice 24 June 1987, (Jean Borrie Clarke-Chief Adjudication Officer)
- Case C-192/85, Court of Justice 3 December 1987, (George Noel Newstead-Department of Transport and her Majesty's Treasury)

1988

- Case C-157/86, Court of Justice 4 February 1988, (Mary Murphy and others-Bord Telecom Eireann)
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1989

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1990

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- Case C-262/88, Court of Justice 17 May 1990, (Douglas Harvey Barber-Guardian Royal Exchange Assurance Group)
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1991

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Belgium)

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- Case Case C-108/90, Court of Justice 25 July 1991, (T. Emmott–Minister for Social Welfare and Attorney General)
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- Case C-159/90, Court of Justice 4 October 1991, (The Society for the protection of unborn children Ireland Ltd.–Grogan and others)
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1992

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1993

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1994

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- Case C-128/93, Court of Justice 28 September 1994, (Fisscher–Voorhuis Hengelo BV en Stichting Bedrijfspensioenfonds voor de Detailhandel)

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 - Case C-408/92, Court of Justice 28 September 1994, (Smith e.a.-Avdel Systems Ltd.)
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1995

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1996

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ANNEX

**OESO-rapport Shaping Structural Change, the role of women.
Report by a high level group of experts on women and structural change in the 1990s to the Secretary-General, OECD, Parijs, 1991**

Preface

OECD countries will be faced in the 1990s with the multiple challenges of increasing globalisation and rapid technological advance and, in some countries, profound demographic changes. These require that economies and societies be both adaptable and dynamic. Structural adjustment and structural policies will need to ensure that the pattern of growth is an sustainable one, on economic and also, most importantly, on social grounds.

Despite considerable economic progress in OECD-countries, a number of societal issues remain matters of concern. This applies particularly to the persistent inequality of opportunities for women. Inability to progress faster in this area also jeopardises progress in other areas, because it represents a failure to benefit generally and fully from the enormous contribution that women can make to economic growth and social improvement. Major rigidities in the socio-economic system need to be addressed. It is hence for these reasons that a high-level Group of Experts was invited to examine the interrelations between the process of structural adjustment and the integration of women in the economy in the 1990s.

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M. Francis Blanchard, Special Advisor to the Secretary General of the United Nations and former Director General of the International Labour Organisation chaired the Group. His depth and breadth of experience, as well as his personal qualities, proved to be invaluable. The other members of the Group also brought to bear their diverse experience in labour relations, international affairs, academic world and that of public policy, together with a rich knowledge of the changing economic and social role of women. The members served in their individual capacities: their report commits neither the organisations to which they belong nor OECD governments.

The report makes an important contribution to addressing a complex and much debated issue from a new perspective. It is noteworthy, given the diverse cultural and intellectual backgrounds represented, that the report was unanimously agreed. The report establishes clearly that the obstacles inhibiting fuller participation by women in the economy are structural in nature. Importantly the directions for action that are indicated would bring forward progress that, in most cases, would accrue not only to women but more widely to the functioning of the whole socio-economic system.

The report is brought to the particular attention of the OECD Member governments, for it promises to be a valuable input to the OECD's continuing work adjustment. It is also directly relevant to making operational the New Framework for Labour Market Policies. The OECD Working Party on the Role of Women in the Economy has a special interest in the work of the Group, which builds on their past efforts; the report will undoubtedly stimulate their future deliberations. Indeed I am confident that the report will stimulate discussion in many groups - including in business and in the trade unions, as well as in the media, community organisations, and women's groups.

Jean-Claude Paye

Secretary-General of the OECD

AN ACTIVE SOCIETY SHAPING STRUCTURAL CHANGE

An "Active Society"

An "Active Society" has been defined by this Group as their vision for the future and a guiding principle for structural reform. An active society is one characterised by opportunity and choice, cohesion and solidarity. It is responsive to changing social and economic needs and enables its members to influence the direction of change.

Enhancing "activity" goes beyond attempts to achieve full employment or increased labour force participation. It means taking bold steps to encourage economic and social participation by recognising the multiple areas of activity - market and non-market that individuals are engaged in, and acknowledging the growing interdependence between those areas of activity.

Establishing an active society requires a long term commitment. The future starts today. Societies create in the present the structures within which they will operate tomorrow.

Women as economic actors

Realising an active society demands a new perspective on women as economic actors. This report argues that the smooth functioning of OECD societies and their supporting economies in the 1990s and beyond depends on recognising women as principal economic actors and enabling them to realise their untapped potential. It challenges the traditional assumption that equity and efficiency are mutually exclusive outcomes that have to be traded off against each other. Women are not a problem for the economy. On the contrary, the solution to economic problems depends on enhancing women's economic role. Women are a key resource that is currently under-utilised, both quantitatively and qualitatively. The report stresses, however, that meeting the twin goals of equity and efficiency requires significant changes to the "system". Those represent a major structural adjustment challenge.

Structural adjustment

This report describes structural change as a global and dynamic process which profoundly modifies economies and societies. Economic, technical, social, political changes interact; the outcome of these interactions is what defines structural change. The various aspects of change are interdependent and cannot be considered in isolation.

The OECD approach to structural adjustment has developed over time. An initial focus on economic management has evolved to include social transformation as an integral element of the adjustment process. The communique of the 1991 OECD Council Meeting at Ministerial Level devoted a specific section to the "social field".

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This Group's report contributes to a broad definition and approach to structural adjustment.

Structural adjustment is not a predetermined development to which individuals have to adapt passively. It can be shaped according to societies' priorities. Social innovation building new institutions and establishing rules of the game is the process through which society both accommodates new constraints and possibilities emerging from technical and economic change, and respond to the changing needs of its members.

Effective structural adjustment depends upon all individuals, both women and men, playing an active role in shaping structural change. Women's opportunities to influence the adjustment process have so far been minimal and their share in the benefits brought by structural change limited. Empowering women to become active agents shaping structural change requires a redefinition of the inter-relationships between the social, economic and political factors that currently inhibits women's participation and life choices. It means applying a new perspective to the causes of inequality.

The need for a systemic approach

In the 1970s and 1980s, "women's issues" were largely defined in terms of discrimination. The key concern was the elimination of direct discrimination. Legislation was seen as the most appropriate tool for "protecting" women's interests and ensuring legal equality. Equal opportunity programmes designed to remove barriers and to "open the door" to labour market participation were introduced to complement anti-discrimination legislation.

Although a necessary condition for achieving gender equality, the limited impact of anti-discrimination and equal opportunity measures points to the systemic nature of genderbased inequalities, and the need for a systemic solution. That solution lies in applying an integrated approach to institutional change aimed at addressing the contradictions and tensions generated at the interface between the household, the community and employment structures. Clearly, the rewards of change will not accrue exclusively to women. Men's life choices will also be enhanced and society as a whole will benefit from such an integrated policy strategy.

The report identifies key areas where those tensions might be tackled. Compatibility between family responsibilities and labour market participation and shared roles between men and women are central issues for structural adjustment. They have been given high prominence by the Group. Occupational segregation and flexibility in employment have been identified as two other priority areas influencing women's role in structural adjustment. They need to be addressed in the context of efforts to achieve compatibility between family and employment and shared gender roles. Furthermore, valuing diversity in society and enabling women to take greater responsibility for decision-making will accelerate desired progress. The important role of international co-operation in the light of increased globalisation is also underlined.

Seizing opportunities for change

The climate of structural change affecting OECD economies and societies provides a favourable context in which to tackle age old problems and their modern manifestations. Structural change offers a foot in the door it opens up opportunities for further change which can be seized and built on. However, change also carries associated risks which need to be acknowledged and dealt with.

Opportunities to enhance both economic efficiency and gender equity in the 1990s have to take into account the multiple influences of the structural forces at play and specific circumstances in each country. There is significant diversity amongst OECD countries, in terms of both the economic integration of women and industrial, labour market, social and political structures. This report does not dwell on the differences between countries; the nature of the problems and the objectives to be pursued are strikingly similar everywhere. Factors such as demographic and technological change, and the growing internationalisation and tertiarisation of OECD economies, are treated as contextual variables.

FAMILY AND EMPLOYMENT: UPDATING THE GENDER CONTRACT

More women and also more men are facing dual and often conflicting labour market and family responsibilities. Ensuring the compatibility of employment and family commitments within individual lives is a major challenge emerging from the process of structural change. Shared family and employment roles will increase the potential labour force, promote a better utilisation of human capital, enhance gender equality, and improve quality of life.

The "Social Contract" and Gender

Life is organised around an implicit "Social Contract", Its two components, the gender contract and the

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employment contract define the current division of family and labour market roles. Within the gender contract women assume the bulk of family care and domestic functions, while men are ascribed primary responsibility for the family's economic or financial well-being. The employment contract reinforces this division of labour by defining as its norm, the sole breadwinner in continuous full-time lifelong employment.

The social contract conflicts with the new reality of men's and women's lives. Dual earner and single adult families are increasingly common while households with full time homemakers have declined dramatically. Female labour market participation has multiplied in response to women's high employment aspirations, the economic needs of families and demands from the economy for more labour. Most women are now forced to juggle household and family demands with involvement in paid work structures designed to fit male employment patterns. Men miss out on the emotional rewards of the care and development of children because they are similarly constrained by the gender-based division of household and employment responsibilities.

The need for adjustment policies

Despite the obvious need for a redistribution of household and caring tasks to match the reallocation of employment responsibilities the gender contract remains relatively static. Women have had to adjust their own lives to cope with conflicting employment and family roles. Those with financial resources employ someone else to fulfil part of their family responsibilities. Others delay or forego having children. Demographic trends mean that many women are confronted with increasing pressure to care for elderly relatives. Both the care of children and adult dependents puts constraints on women's labour market participation and career progression.

Specific features of taxation and social policies act as impediments to shared family and employment responsibilities. In spite of other efforts to encourage women's labour market participation, policies based on the sole breadwinner two-adult family such as joint-income testing for social security benefits and dependent spouse allowances have disincentive effects on women's employment and men's ability to play a greater role in family care.

Peripheral adjustments to the employment contract such as part-time work have in most cases done little to modify employment norms or gender roles. Because women often "choose" part-time work for family reasons, employment is seen as their secondary or peripheral activity. Most women working part-time do not experience a corresponding reduction in their domestic obligations. Evidence for some countries suggests that women working full-time are more able to transfer some domestic responsibilities to other family members. Ironically, the "double burden" may then be more pronounced for women working part-time. In its present context, part-time work may entrench the traditional gender-based division of market and non-market activities.

Compromise strategies are not solutions; they only deal with the symptoms of problems. The real cause is the traditional gender-based division of market and non-market activities and the incompatibility of employment and family responsibilities remains intact. Failure to address those conflicts has high costs, increased stress for individuals, particularly women; possible declining quality of care for dependents; increased family breakdowns; as well as reduced productivity, increased absenteeism and staff turnover amongst workers facing competing family responsibilities.

Fundamental adjustment is required to resolve the current contradictions generated by the social contract. This means enhancing compatibility between domestic and employment responsibilities.

Flexibility in working time

Men as well as women are increasingly unwilling to sacrifice family time and quality of life for a job that places unreasonable demands on their time. A reassessment of the time commitments demanded of workers is needed. Rigid adherence to the full-time employment model inhibits the development of a new "worker profile" and blocks attempts at a new distribution of household and employment responsibilities. The inability or unwillingness to work long hours should not be seen as indicative of a worker's lack of commitment to employment.

Vertical career mobility is associated with pressure to work longer than regular hours. In most OECD countries, the working life span is now compressed into a relatively short period due to increased time spent in education and earlier retirement. The critical time for career advancement typically coincides with the period when children are young and the demands of family care are greatest. Women's domestic responsibilities create enormous obstacles to their ability to compete on the labour market. The "Mommy track" describes the extent to which women with family responsibilities are slotted into separate and less lucrative career tracks. The same workplace commitments similarly distance men from sharing the rewards of household and caring functions.

New employment models need to be implemented which allow men and women to combine a career with family responsibilities while maintaining their quality of life. Schemes that allow workers to work reduced or flexible hours without changing jobs would enable men and women to remain in employment, and maintain their career progression, while assuming responsibility for family care. Flexibility in working time might take a number of other forms; intermediate part-time work with the option to return to full-time hours, flexitime, job sharing, or the ability to

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"capitalise" time over the working week. Maintenance of seniority and work-related benefits are crucial factors in the success of any of these options. An overall reduction in working time might also have positive impacts on men's and women's ability to combine family and employment responsibilities.

Total "working time" for an individual includes the time spent in paid work and time spent fulfilling domestic commitments. In practice, flexibility in working time usually means women adjusting their domestic schedules to take on part-time employment. Real compatibility between family and employment responsibilities depends on enhanced flexibility in both working hours and in the organisation of household and caring tasks, supported by an adapted social infrastructure.

Career breaks

Continuous linear career progression is becoming less common as both men and women take breaks from employment at various points throughout their working lives. Time spent outside the paid workforce whether for family care, travel, education or community and civic activities should be viewed as opportunities for skills development and personal enrichment rather than periods of "inactivity". The interpersonal and organisational skills acquired in family care and child development have definite labour market value. Career breaks should not jeopardise an individual's future employment opportunities. On the contrary, when they are short and for a specific purpose, they should enhance career prospects.

Women now take relatively short breaks out of the labour market and their career attachment is increasingly strong. In spite of that, institutional arrangements and social attitudes remain tied to the past when family formation typically signalled long-term or permanent withdrawal from employment. The result is that women have commonly have difficulty returning to employment that matches the level they enjoyed prior to taking leave. Career interruptions however short can still have long-term negative effects on earnings and income security.

Maternity leave is crucial for women workers, as are parental leave provisions for both male and female employees. However, when parental leave is only available to women, or chiefly used by women, it may also be used to justify employer discrimination against female employees. Schemes that include incentives for men to take family leave would encourage a more equal division of household and family tasks. Incorporating some form of earnings replacement, and maintaining superannuation payments and employment protection, increases the viability of parental leave for both parents.

Mechanisms for maintaining skills during prolonged leave or updating skills on re-entry to employment would help to counteract the current costs associated with career interruption. Employers providing reinsertion training and competence bridges can ensure the maintenance of a skilled and flexible workforce. Maintaining links with employees on leave has other advantages, such as having access to a supply of skilled workers who can be called on to meet short-term demands for additional staff.

Social infrastructure

Catering to the needs of families and workers depends on a range of social and personal services. Women still shoulder the bulk of child and dependent care as well as domestic tasks. Alternative for providing these services would free women to compete on the labour market. Collective responsibility for social support networks must be recognised on a par with the accepted social responsibility for the supply and maintenance of transportation, communication and utility networks.

Experience in some countries suggests a high correlation between women's labour market participation and the public provision of family services. Other models may prove to be just as successful. These could include provision by private institutions operating on a market basis, community based co-operation, or some innovative mix of funders and providers. In all cases governments have an important role to play, especially in setting the ground rules, encouraging initiatives from various actors and facilitating the conditions under which they operate. The accessibility, comprehensiveness and quality of services depends on a co-ordinated approach.

Employers are discovering the multiple benefits to be gained from helping employees to meet their family obligations especially the care of children and elderly relatives. Large enterprises have the resources to provide workplace creches, to sponsor school holiday programmes, mobile nursing care, or include childcare payments in remuneration packages. Small or medium-size enterprises can engage in joint ventures. All of these initiatives could be enhanced by state support or co-ordination. The pay-offs for employers range from reductions in absenteeism, decreased staff turnover and savings on associated recruitment costs, to an enhanced corporate reputation.

Services providing for the care and education of children require special consideration. It is generally agreed that access to employment for parents with very young children depends on the availability of comprehensive childcare services. There is a growing and equally important need for school holiday and after school care. School schedules have a profound impact on the nature and extent of women's labour market participation. When school

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close at lunchtime on the assumption that a mid-day meal is provided for children at home, when the school day finishes in the early afternoon, or when schools close mid-week, parents are forced to find alternative care arrangements or to modify their own working hours.

Holiday and out of school programmes would also address growing concerns about the extent to which children are left either unattended or inadequately cared for in the gap between school hours and the end of the working day, or during holiday periods. Existing educational resources, including school buildings, libraries and other materials can be put to better use in the context of these programmes.

Demands from the growing number of elderly for care and services will also need to be urgently addressed, especially given the pressures on state-funded income support for senior citizens. Care of the very old or the very frail can require greater time commitments over a longer period than care for children, and typically involves increasing, rather than decreasing, levels of dependency. Enhancing opportunities for older people to maintain their social participation is an added consideration.

Other elements of the general social infrastructure including transport services, the proximity of housing to the workplace, housing that fits diverse family types, and convenience of shop opening hours and services also require revision in the light of changing family structures, and women's increasing labour market participation. Establishing "family friendly" urban environments is a key factor in combatting increasing conflict and social disintegration in urban settings.

The social construction of gender

Women cannot fully respond to or play a major part in shaping structural change unless men's life patterns are also modified. Encouraging men and women to organise their lives differently by changing the structures in which they operate is likely to facilitate behavioural and attitudinal change.

Young people need to be well-equipped for their future employment and family responsibilities. That will require further adjustments to the structures that mediate the social construction of gender. Attempts to remove gender bias from education have tended to concentrate on widening girls' employment horizons. Preparing boys for their future responsibilities as parents and partners is equally important.

Conveying the universal benefits of shared family and employment responsibilities will develop community awareness and public acceptance of the revised gender contract. The media is a powerful tool for promoting positive images of shared gender roles and the new reality of household and family life. Information campaigns sponsored by government or private sector institutions can give specific visibility to certain aspects of change, such as the rewards available to men through playing a greater role in child care and development.

Directions for Action

Eliminate the sole breadwinner two-adult family as the primary norm for the range of taxation and social security policies.

Encourage men to take advantage of the opportunities to increase their participation in family care.

Develop systems that enable workers to make temporary exits from employment, or to modify their working hours, without sacrificing their career development prospects.

Seek innovative ways of providing essential household and caring services, and adjust the social infrastructure, to support women's increasing labour market participation, and diversity in family types.

Utilise the media and other forms of information dissemination to promote public acceptance of men and women as equal partners sharing family and employment responsibilities.

OCCUPATIONAL SEGREGATION: ENHANCING CHOICE AND UPGRADING OCCUPATIONS

Occupational structures and the skills content of many jobs are undergoing profound changes. This creates opportunities for reducing occupational segregation and pay discrimination which are sources of labour market rigidity and gender inequality. *Broadening occupational choice and upgrading occupations will facilitate the development and efficient allocation of human resources and promote more equitable rewards.*

The gender segregation of occupations

The vast majority of workers are employed in occupations where their own gender predominates. The gender segregation of occupations persists in all OECD countries, despite dramatic increases in women's level of education, labour force participation, and attachment to employment.

Gender segregation creates a major labour market rigidity. It inhibits the smooth reallocation of workers from

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surplus to deficit sectors, thereby contributing to unemployment, short-term skills mismatches and longer-term skills gaps. The optimal use and development of the potential pool of human resources is subsequently constrained. Where the numbers of skilled young people entering the labour market are declining, the pressure to respond to changing labour markets demands will impact mainly on the adult labour force. Adjustment will be limited by the degree of current segregation in the adult labour force.

Gender segregation is also a source of labour market inequalities. Different values and remuneration are attached to men's and women's jobs. Most female dominated occupations are characterised by low status, poor remuneration and limited potential for skills acquisition, promotion and training. Some women's jobs are "economic ghettos" where low pay and benefits are the expected rewards even after long tenure. Women's aspirations are blocked and their talents are wasted because their choice of occupation is limited to a sub-set of options.

There are growing contradictions between the characteristics of women's jobs and those of their female incumbents. New generations of women are well educated and have continuous labour force attachment, yet many are still employed in either "unskilled" occupations such as sales or personal services or in skilled "female" occupations which offer relatively limited prospects for career advancement such as nursing or teaching. Even in "mixed" occupations, women cluster at the lower levels or perform tasks that are consistent with traditional female roles.

The changing composition of occupations

Occupational structures and the content of many jobs are undergoing profound changes. New technologies, changing demand, innovative methods of production and work organisation, and modern decision-making structures all contribute to the redefinition of jobs and a new occupational composition of employment. In many cases occupational definitions and classifications are being revised. The redefinition of skills and the relative value of different types of skills is central to this exercise. This dynamic process offers a real opportunity to dismantle current gender-based occupational segregation.

To maintain a competitive edge in the 1990s, OECD economies will have to rely on their competitive advantage, that is their capacity for innovation and high quality production of goods and services. A highly qualified, functionally flexible and mobile workforce is therefore essential. Investment in skills upgrading is crucial. As an under-utilised labour market resource, women are an obvious target for upskilling. The demand for skilled labour will improve women's earnings capacity.

Despite the promising longer term outlook, the immediate future is less rosy. Significant job losses are the inevitable outcome of economic restructuring in most OECD countries. This affects mainly unskilled workers, many of whom are older women with limited basic education and few transferable skills. Another critical concern is the exceptionally low status of some traditional female occupations. Some of these occupations especially in the personal and social services will continue to be growing employment sectors. Improvements in the status and conditions of these occupations are unlikely while the effects of past discrimination continue to distort market signals.

The current climate of structural change offers an ideal opportunity to challenge the inefficiencies and inequalities mediated by the gender segregation of the workforce. Broadening women's occupational choice, upgrading female occupations, reducing organisational hierarchies and introducing more mobility in women's professional lives are directions through which the most detrimental effects of gender-based occupational segregation can be eliminated.

Enhancing occupational choice

Women's occupational choices are currently constrained. This impacts on the labour market and economic status as well as their working and living conditions. Lifelong learning offers opportunities to enhance women's occupational choice. Initiatives related to initial education and further education and training need to be refocused to promote lifelong learning.

Initial education

Initial education is a major determinant of future occupational orientation. Gender inequalities in initial education now relate more to the type than the quantity of education received. In many countries girls surpass boys in their participation and performance in general education, yet their occupational choice remains relatively limited, mainly because general education tends to lack career orientation. Boys' initial education is more likely to be employment oriented. Where girls do receive vocational training at the initial level, they are channelled into a narrow range of traditionally female occupations.

Broadening girls' occupational horizons depends on making the content and transmission of technical subjects more attractive and relevant. Skilled occupations require at least some understanding of basic technologies. Many

girls tend to reject scientific and therefore fail to acquire the prerequisites for specialised training. Girls are often discouraged from technical subjects by gender-biased teaching methods and curricula. Technical occupations also have to resolve an image problem if they want to attract more women. Research on the computer science field suggests that even though girls are highly attracted to computer technologies, many overlook a professional career in an area which they perceive to be male-dominated. There is considerable scope for occupations and industries to forge links with educational institutions to promote potential career opportunities. Attracting girls to scientific and technical fields is essential for avoiding critical skills gaps anticipated for the future.

Labour market recognition of the skills acquired through general education would also help to alleviate a growing "skills mismatch". While general education falls somewhat short in providing students with technical skills, it does instil a range of abilities: abstract thinking, problem solving, interpersonal communication, and having an increasing value in the workplace. A report prepared for OECD Ministers of Education (*High Quality Education and Training for All*, forthcoming) states that "modern work processes imply the fostering of a broad range of human capabilities including the creative, co-operative, informed, versatile, analytical and open-minded". General education develops these skills and competencies which most girls therefore acquire. In contrast, purely vocationally-oriented initial education which mainly boys receive may be deficient in some of the key skills required in the modern workplace.

In the future, initial education will focus on providing a solid foundation for lifelong learning and developing an individual propensity and capacity for future learning. Initial education should equip all young people with a broad base of generic skills: literacy, numeracy and interpersonal skills, all of which will be recognised as important labour market assets. In that context initial education would no longer determine or restrict occupational choices in different ways for girls and boys. It would also extend the opportunities to continuously redefine initial choice by developing an ability to participate in further education and training.

Further education and training

A general skills upgrading of the adult labour force is part of the process of modernisation being undertaken in OECD economies. Enabling women to take advantage of further education and training programmes will be a key factor in avoiding potential skills gaps. Women should be encouraged to train for occupations in growth areas which offer employment prospects and good earnings capacities.

Currently, women are less likely than men to benefit from further education and training programmes. Fiscal and political constraints mean that public training programmes usually give priority to acute short-term needs, typically unemployment. Women tend to miss out on public training opportunities because they are under-represented in unemployment registers and among unemployment benefit recipients.

Women are also more likely to miss out on enterprise training. Enterprises generally offer training on the basis of seniority and qualifications. Unskilled workers or workers in non-standard employment, many of whom are women, are often ineligible for enterprise training programmes. Employers' perceptions of the likelihood that the worker once trained will remain with the firm is also important. Despite women's increasing labour force attachment, the expected returns on investment in training female workers are still perceived to be lower than the returns on training male workers. Women's employment tends to be concentrated in small enterprises which lack the resources for comprehensive human resource development.

Stimulating enterprise training for women means promoting its potential benefits to employers. Employers who select trainees from part of the available pool are not making the best use of the human resources at their disposal. As the demand for skilled labour increases, their competitive position is likely to suffer. The expected returns on training are manifold. Providing training is an essential factor in maintaining a skilled and functionally flexible workforce. Human resource development and internal promotions enhance staff stability and employee attachment to the firm, which should be weighed against the costs and risks associated with external recruitment. Efficient investment in training depends on the rejection of outdated assumptions. The assumption that women are more likely than men to quit their jobs may create a vicious circle wherein women who are denied access to training and promotion are encouraged to leave.

The introduction of some form of "training entitlement" could ensure a more even spread of further education and training opportunities. Training entitlements are consistent with lifelong learning. It can be argued that each individual has a right to a certain amount of education and training across the lifecycle. This would enable those who received little initial education or vocational training, often middle-aged and older women, to have a "second chance" or to "catch up" at some later point. It would also be instrumental in side-stepping rigid eligibility criteria that have hitherto excluded women from opportunities for further learning. Entitlement models already exist in some OECD countries.

Developing innovative training models that fit women's daily schedules and lifecycle patterns will facilitate their participation in training programmes. Locally based training initiatives are more accessible to women whose geographical mobility and time flexibility is limited by domestic and family responsibilities. Training options such as

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part-time courses, community based initiatives, correspondence courses or distance learning should be developed. Modular training courses broken into self-contained and individually assessed training modules offers more flexibility in the timing of skills development. Including childcare in the design of training courses greatly enhances their viability for women with young children.

Training has to cater to a broad range of needs. Some women lack initial education including literacy skills and require basic entry level qualifications. Women rejoining the labour market after a period of leave may require "bridging" courses, to update their skills and to re-build their self-confidence. Women following the growing trend towards changing occupations at various points across the lifecycle require training to acquire the skills needed in the new occupation.

Modern labour markets demand functionally flexible workers with skills that can be applied across industries rather than those that are firm or even industry specific. There is a growing need to increase the transferable skill level of the working population. It is imperative that all training is appropriately accredited to allow the transfer of skills and qualifications within and across industries. When women receive enterprise training, it is more likely to be informal on-the-job training rather than formal in-house or employer supported external training. Informal on-the-job training is important for skills acquisition but those skills are rarely recognised or marketable outside the firm. Formal training is more likely to provide portable skills that have a positive impact on future earnings. Skills and competencies are also gained informally through socialisation and household management. Improving the transparency of skills is necessary to increase efficiency in the allocation of labour.

Breaking the cycle of under-investment in female training will require the development of a more comprehensive co-ordinated training environment. While individual employers could be pressed to provide specific job-skill training, an increase in investment in general training demands a more collective effort. Unions are involved in identifying training needs for different categories of workers. Governments will need to act as a catalyst by promoting co-operation between enterprises, between industries, between industry and training providers and between the social partners to set standards, to plan future skills needs to negotiate how these needs might be met. A collective approach to the provision of training means sharing both the costs and the rewards, and recognising the relative ability of individuals to pay for their own skills development. Women should be able to share in the rewards without having to bear costs that are beyond their means.

Directions for Action

Initiate positive action measures to promote a wider range of occupational choice for girls and women.

Ensure that initial education is devoid of gender bias and equips young people with a broad base of skills which develop adaptability and a propensity for lifelong learning.

Ensure that further education and training produces transferable skills that match employment prospects and improve women's earnings capacity.

Increase women's participation in further education and training through entitlements and innovative models for training.

Create incentives for enterprises including small enterprises to develop investment in human resource development.

Upgrading female occupations and building career paths

Workers in all areas are being asked to adapt to changing technologies and work processes. In some occupations these changes have resulted in modifications to existing job classifications, the development of new career paths and, as a result, improved remuneration. There is considerable scope to upgrade traditional female occupations in this way. Upgrading female occupations involves revaluing and enriching the skills content of those occupations and enhancing internal and external mobility. Reorganising work, in particular by changing rigid hierarchical structures, offers additional prospects for improving women's advancement in employment.

Upgrading skilled occupations may prove less difficult than upgrading unskilled occupations. Stiff competition for skilled personnel will force skilled female occupations to offer better conditions, improved remuneration and enhanced career development. Already some countries are facing a shortage of nurses or teachers. In the longer term, improved conditions will have an effect on gender segregation. Men will be more likely to enter occupations offering skills recognition and career advancement.

Updating job classifications

Many of the skills actually required in female occupations are not reflected in current occupational definitions or job descriptions. Informally acquired skills "tacit" skills tend to be ignored even when they are essential for the task at hand. These skills are undervalued because they are seen as "natural" female competencies, or because they mirror domestic tasks that women perform outside the workplace for free. The development of some of these

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competencies particularly people-oriented skills are an important component of specific training programmes, such as management training.

The introduction of new technologies has significantly increased or modified the skills requirements of many female occupations. For example, nurses have had to adjust to rapidly changing medical technologies, while new information technologies have totally transformed secretaries' tasks. However, in most cases the higher skill level involved is not recognised and the status of those occupations remains unchanged.

Reassessing the skills content of feminised occupations is part of the process of seeking acknowledgement for both the previously unrecognised skills and the new skill requirements of these occupations. Traditional job evaluation techniques tend to be gender-biased in that they value manual and technical skills typically held by men and undervalue organisational and social skills held by women. Methods identifying the full range of competencies actually required to perform a job informally acquired skills as well as those gained through formal certification give impetus to raising the relative value of feminised occupations to their true level. Job evaluations based on such methods demonstrate that many of the skills involved in "female" occupations are also applicable to other occupations. This would make it possible to include female occupations in "dynamic" occupational classifications allowing for a high degree of mobility.

Compared to male occupations, traditional female occupations are broadly defined and offer flatter career paths. To some extent women appear concentrated in a narrow range of occupations precisely because the definitions of those occupations are so broad. For example, "secretary" covers a multiplicity of different tasks, functions and levels of seniority. Mobility within the occupation can be high, but intra-occupational vertical mobility is severely constrained. Disaggregating broad occupational categories would reveal paths career progression within occupations. Female occupations are also "closed" occupations, with few possibilities for inter-occupational mobility. Identifying specific levels at which links could be established with other occupational categories would be easier if female occupations were less broadly defined.

Opening up new career paths will enhance intra- and inter-occupational mobility. This is a crucial factor in ensuring the reallocation of workers between sectors in response to changes in demand for skills. The development of career paths will increase women's incentives to invest in their own training. Workers are more likely to seek training if they anticipate concrete rewards for their efforts.

Reorganising work

New forms of work organisation that involves more participatory decision-making structures and a greater emphasis on team work and co-operation are being introduced in some enterprises in response to changes in production and marketing methods and the dissemination of new technologies.

A co-operative integrated workplace is more "woman-friendly" than the traditional work environment based on individual competition and hierarchical structures. This applies to women in both skilled and unskilled occupations. Women tend to progress faster in modern dynamically organised firms than in those firms where traditional industrial hierarchies prevail. For example, there are cases where women's production teams based on the sharing of skills and knowledge, and provision of peer support have helped to overcome some of the barriers associated with women's entry to and isolation in non-traditional occupations.

Modifications in workplace organisation could assist in upskilling female occupations. This may prove particularly useful for enriching the skills content of occupations currently defined as "unskilled". Introducing variety and diversity into women's work would serve to increase the skills content of unskilled female occupations and enhance women's functional and occupational mobility.

Pay equity

Comparable worth of pay equity assessments carried out in selected OECD countries have revealed the extent to which feminised occupations are underpaid. Industries employing underpaid women are subsidised by the low wages paid to those workers. The consistent undervaluation of women's work distorts market signals, and results in a misallocation of workers, low productivity, and subsequent losses to economic growth.

Pay inequities are often so entrenched that they are unlikely to disappear without policies directed at earnings parity. Pay equity policies can reinforce the effects of other efforts to increase women's earnings capacity. A variety of "equal pay for work of equal value" schemes have been introduced in OECD countries. Many have not been in place long enough to judge their full impact. Some countries also address the problem in the context of their wage policy, in particular policies on minimum wages or low wages. National monitoring and international comparisons of attempts to reduce the "earnings gap" are needed to assess the relative efficacy of the various approaches.

Directions for Action

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*Revalue the unacknowledged skills content of "female" occupations.
Enrich the skills content of "female occupations and construct new paths of career progression.*

EMPLOYMENT FLEXIBILITY: MEETING THE NEEDS OF WORKERS

Employment flexibility and diversity is a growing reality generated by structural change. Flexible employment and mainstream employment should form a continuous spectrum of opportunities. Developing new forms of flexibility and enhancing equity and mobility between the diverse forms of employment will reduce the risk of workers being marginalised on the periphery of the labour market.

The demand for flexibility

Structural change drives a general demand for employment flexibility. Employment flexibility can accommodate the needs and preferences of an increasingly diversified labour force. It also greatly enhances the ability of enterprises to adjust to the changing economic environment. Flexibility takes many forms. It applies mainly to working time, work organisation and employment contracts.

The concurrence between employers' and workers' demands for flexibility is not total. Preferences and needs diverge concerning the types and areas of flexibility. While it is recognised that flexibility in working time arrangements and innovative or flexible forms of work organisation have positive effects on both productivity and employee satisfaction, the direction flexibility has taken in OECD countries is predominantly in the development of non-standard forms of employment.

Employment flexibility in principle has the potential to meet the needs of women workers. However, in practice not all types of employment flexibility are equally favourable. New forms of employment which have developed as a form of labour market flexibility in OECD countries over the past ten years offer significant opportunities but also present many drawbacks.

The development of non-standard forms of employment

"Non-standard" forms of employment part-time work, sub-contracting, temporary and casual employment, home-work, short-term employment, and self-employment are a growing reality in OECD countries. In a number of OECD countries this development has been facilitated or encouraged by public policy: relaxation of regulations applying to non-standard contracts, incentives for employers to create non-standard forms of employment, and incentives for the unemployed to accept such contracts.

Women appear in all non-standard employment categories. They form the vast majority of part-time workers, many are employed in small sub-contracting enterprises and they account for the largest share of the increase in self employment. Non-standard forms of employment expand employment opportunities for women because they provide alternatives to the traditional standard employment model which as noted above typically restricts women's employment options. On the other hand, job and income security and conditions of employment are usually inferior in non-standard employment and there is a real risk of marginalisation on the labour market.

Flexibility versus security

Non-standard or flexible employment is increasingly referred to as the "unprotected sector". These forms of employment often fall outside the boundaries of existing protective labour regulations, and are usually excluded from provisions negotiated collectively or granted at the discretion of employers. Flexible employment usually means lower wages and lower security, thus undermining the theoretical assumption that there is a trade off between wages and security.

Part-time work serves as a useful illustration of the reality of flexible employment as it affects women. More than three-quarters of part-time workers are female, and an increasing proportion of women in OECD countries are employed on a part-time basis. Part-time work not only involves shorter than normal hours; it is also usually associated with lower status. Part-time workers generally encounter less favourable conditions of employment across a whole range of benefits: paid leave (including maternity leave), access to training, pensions and in-kind benefits. Part-time workers tend to be considered peripheral and therefore dispensable, and their dismissal is easier and less expensive. Entitlement criteria to social security benefits designed by reference to "standard" employment often exclude part-time workers; in any case, the level of benefit is quite inadequate when it is earnings-related.

Employment in sub-contractor enterprises is another example of non-standard employment offering inferior protection and benefits. Many services which typically employ women (such as cleaning or food preparation) are

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sub-contracted by large public and private enterprises. Sub-contractors are usually small enterprises. They therefore meet with the usual size-related limitations on the provision of benefits and services, worker representation and leave opportunities (such as training or parental leave). Wages paid by sub-contractors tend to be less than those paid by core enterprises. Mobility between peripheral sub-contractor enterprises and core contracting enterprises is limited. Working for an intermediary or a sub-contractor rarely gives access to the internal labour market of the contracting enterprise.

Terms and conditions in non-standard contracts are often individually negotiated. The ability to bargain with an employer requires a high degree of self-promotion and assertiveness characteristics that in the past have not been encouraged in women. Women often find themselves in situations where they have to trade-off wages or other benefits for the time flexibility they need to meet their competing family responsibilities. When collective agreements apply these elements are non-negotiated at an individual level. Unless steps are taken to equip workers with the tools of negotiation, non-standard employment may increase worker vulnerability and exacerbate the unequal power relationships between employers and individual workers.

Equality legislation has a limited impact on non-standard forms of employment. It is usually designed by reference to standard employment and its implementation depends on traditional industrial relations structures. In the case of pay equity legislation, for example, job evaluation techniques used in comparable worth assessments may be less appropriate in the case of flexible contracts involving equally flexible job descriptions. Moreover, because workers in flexible forms of employment are less likely to be organised and this reduces the opportunities to make collective pay equity claims.

Flexible employment and choice

Flexibility and enhanced choice develop in parallel. Employment flexibility increases opportunities for women, while non-standard forms of employment such as part-time work and self-employment allow women to circumvent some of the most stringent barriers they face in standard employment. However, there is scope to further exploit and improve these employment options.

Part-time employment

The experience of part-time workers reveals the limits and contradictions embodied in this type of employment. The advantage of part-time work is that it makes employment compatible with involvement in other areas of activity. For women with young children, part-time work is often the only employment option. However, this does not mean that part-time work always allows for regular family life. Workers with part-time jobs rarely have control over the hours they work and they often work atypical schedules evenings, nights, weekends.

Part-time employment opportunities are relatively limited. Seeking part-time work usually means finding a part-time job. Only a few countries grant workers a statutory right to work reduced hours in their normal job (though in many countries a substantial number of full-time workers report a desire to work shorter hours). Part-time jobs are only available in a very limited range of occupations, often unskilled occupations offering low status positions. Switching to part-time work therefore usually involves a change of job and even occupation. This change in occupation may result in career interruption. Because non-standard forms of employment increasingly constitute a separate segment of the labour market, the possibilities for a part-time worker to transfer back to full-time stable employment are limited. Career interruption mainly affects women. The fewer men who work part-time are typically older men or students, so part-time work does not interfere with their career development. While most women still cite the decision to work part-time to be a voluntary one, many are not aware of the effects that decision will have on their future labour market status.

Self-employment

Self-employment has the potential to enhance women's work choices. It provides opportunities to combine family and employment by giving greater control over working time. Many self-employed work from home or set up their workplace in close proximity. Self-employment offers an escape from discrimination in the workplace including the "glass ceiling", the invisible barrier preventing women from reaching the top echelons of management and enables women to impose their own values on their work environment. However, self-employment is not immune from the lack of income security attached to other forms of flexible employment especially in terms of access to social protection. Small businesses are typically vulnerable to economic fluctuations and often require considerable support at the initial setting-up stage. Self-employed women face other specific forms of discrimination which may undermine their access to venture capital, business advice and other forms of support.

Enhanced flexibility meeting the needs of workers

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Flexibility in employment is no longer a peripheral or temporal phenomenon. The challenge for structural adjustment is to enhance flexibility in the context of standard employment and to improve security and equality between standard and non-standard employment. Flexible employment options and mainstream employment experience will then form a continuous spectrum of opportunities and choices across an individual's working life.

Developing better forms of flexibility

Innovative options are required for improving flexibility in the context of mainstream employment. Flexibility as a mere cost-containment strategy or flexibility that increase employment precariousness is counter-productive. The willingness of workers to accept structural change, to allow themselves to be assigned to new jobs, or to acquire new skills, increases with job security. According to an OECD report by a high-level group of experts on labour market flexibility, a more flexible management of working hours "at the enterprise level ... can lead to acceptable combinations of better capacity utilisation and greater control by individual over their time" (*Labour Market Flexibility*, 1986). Allowing workers more freedom to rearrange their working time would broaden the range of jobs performed on a part-time basis, including skilled jobs and management positions. The possibility to capitalise time over the working week, or even over longer periods, would also allow a much greater compatibility between employment and other activities.

New work models based on flexibility in how tasks are organised are of considerable interest to women. They release rigid working time and presence constraints, and provide scope for women to create a supportive culture in their working environment. As noted in the previous section, this is particularly valuable within a male-dominated organisation and as a means of increasing women's involvement in non-traditional occupations or industries.

New technologies, especially in telecommunications, multiply opportunities for flexibility in the place of work. Workers can work from home, linked to the workplace by computer modem. Working at home allows additional flexibility in terms of when tasks are carried out. Effective support and liaison systems are needed to guard against social problems including isolation often experienced by employees working outside the formal workplace. Home-workers in unskilled occupations are the most vulnerable. Home-based self-employed workers may need specific support, such as access to networks or service pools.

Improving the conditions of non-standard employment

The aforementioned report on labour market flexibility identified and criticised the inferior conditions accorded to workers in non-standard employment: "There is no reason why conditions of work should be worse for those not permanently employed". The report also noted that non-standard employment should not necessarily constitute a separate segment of the labour force: "It should not be assumed that there is no movement of peripheral workers to the solid core. For many peripheral employment may be no more than a short transition to core employment". Increased efforts are required to counter the trend towards marginalisation of workers in non-standard employment. Parity in terms of the conditions applying to workers in standard and non-standard employment, and mobility between the two types of employment, will reduce segmentation and the risk of marginalisation.

Despite progress in some countries, the benefits and protection granted to workers with non-standard contracts are still generally inferior to those granted to workers in standard employment. Measures such as leave entitlements, pensions, and access to training have to be made more widely available to workers in non-standard employment.

Advocacy for workers on non-standard contracts will help to improve conditions. Issues related to non-standard employment need to be put on the industrial bargaining agenda. Worker representatives have traditionally fought for the retention of conditions attached to standard employment. To continue to be effective, the industrial relations system needs to reflect the growing diversity in employment.

As conditions improve in non-standard employment, and flexibility is enhanced in the context of standard employment, the invisible barriers that prevent mobility between the two are also likely to fall away. Specific measures can accelerate the opening of internal labour markets to workers in non-standard employment such as giving those workers priority in recruitment to regular jobs.

Income and social protection measures (discussed in the following section) will also need to adjust to new employment patterns. Increased portability of benefits and entitlements would facilitate individual mobility between different forms of employment and between different types of activities.

Directions for Action

Seek innovative options for enhancing flexibility in the context of mainstream employment.

Set conditions of employment on the same basis for all employees and promote equitable treatment for those in non-standard employment.

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*Improve advocacy for workers in non-standard employment in collective negotiations.
Enhance choice and mobility between non-standard and standard employment.*

VALUING DIVERSITY

Changing social, demographic and employment patterns result in an increasingly heterogeneous society and a growing incidence of lifestyle changes across individual lifecycles. Diversity is an asset in a culturally varied and competitive world. *Valuing this diversity and enhancing mobility between areas of market and non-market activity is needed to counteract exclusion, poverty and persistent dependency.*

Changing life patterns

Men's and women's lifecycle patterns are changing. Diverse family types, new forms of employment and greater opportunities for lifelong learning result in increased heterogeneity between individuals and across the lifecycle of any individual. Policies need to ensure that this diversity does not translate into poverty, persistent dependency or social exclusion and that individuals do not get permanently trapped in a situation appearing at a specific time in their lifecycle.

Policies have tended to focus on stimulating greater participation in employment. OECD Social Policy Ministers notes that "exclusion from the labour market brings with it not only financial costs but also the human costs of dependency, lowered self-confidence and reduced social interaction and activity" (*The Future of Social Protection*, 1988). Failure to acknowledge the value of non-market activities may have similarly negative effects on individual self worth and social participation. People not currently in the labour force are rarely unproductive or "inactive" their time is usually spent in useful and meaningful ways. Fostering participation in both employment and other socially valuable activities such as voluntary and community work, family care, and civic and cultural activities is fundamental to avoiding social exclusion and working towards an "active society".

Recognition of non-labour market activity

Domestic production and voluntary or community work is essential for keeping societies and their support economies functioning. Structural trends such as state retrenchment in the provision of some health and welfare services, and the growing demand for services to the elderly are increasing the pressure on that sector. At the same time, women's increasing labour market participation reduces the pool of people able to fulfil those functions.

The provision of an enlarged range and quality of services depends upon greater involvement in household production and community activities by a broader range of actors. Because family and community services have been mainly provided by women especially home-based women they have remained largely invisible and undervalued. This undervaluation, when coupled with the negative effects periods out of employment have on an individual's future labour market status, discourages greater involvement in the provision of these services. Without a significant revaluation of domestic and community activities, and improved mobility between non-labour market and labour market activities, participation in these tasks is unlikely to increase.

Unpaid activities such as child care, services to the elderly, and managing community organisations, require significant skills, experience and responsibility - competences which are equally valuable in a labour market setting. The organisational and budgeting skills utilised by an individual setting up a community organisation are in no way inferior to those used by someone launching a similar project in a commercial context. Assessing the skills requirements of non-market activities, and the transferability of those skills, is instrumental in recognising and re-valuing the social and economic utility of unpaid activities. It also promotes mobility between that sector and the labour market.

Improving the "conditions" under which unpaid domestic and community activities are carried out stimulates participation in those activities. This involves addressing needs in relation to leave, activity-related expenses, access to social protection and training. When paid workers become ill they are able to take leave, yet those engaged in informal sector activities - especially those involved in family care - have to struggle on. Individuals engaged in community work personally shoulder the activity-related costs - such as transport, and childcare expenses - yet the benefits of their efforts accrue to society as a whole. Social protection entitlements for individuals engaged in informal sector functions - discussed below - is another question requiring a policy response. Training would enhance the quality of services provided and, if it offers credentials, could transform informal sector experience into a recognised labour market asset.

Time-use surveys - being carried out in several OECD countries - are useful tools for assessing the nature,

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extent and economic contribution of non-market activities. The availability of this information can enhance economic and social planning. For example, it has revealed in one case that attempts to reduce government expenditure through withdrawal from the provision of some health and welfare services have resulted in cost shifts - from the public sector to households and the community - rather than cost savings.

Social protection and diversity

Diversity in life and employment patterns has not been matched by corresponding diversity in entitlements to social protection. Personal autonomy and choice depend on increased options to combine different forms of activity - such as combining parenting and community activities with some form of employment - and being able to change that combination at some later point. The risk of becoming trapped in a transitory life phase is specially real for women. Women have a higher chance of becoming dependent on social security or income derived from a male spouse, and are more at risk of failing into temporary or long-term poverty. The further feminisation of poverty is a looming threat.

Eliminating persistent dependency is a major challenge. Dependency traps are an unintended outcome of most social security systems. Policy responses to short-term situations can sometimes cause long-term problems. Transfer payments to lone parents is a typical example. High effective marginal tax rates applying to individuals moving off social security into employment can trap them into dependency, especially when they are only able to take on part-time work or when their expected wage levels are low. The costs associated with labour market re-entry, combined with a shortage of affordable child-care services, compel many lone parents - usually women - to remain on social security despite their employment readiness. It is important to recognise the costs of transition, by allowing individuals to move gradually from social security to employment. Assistance for work-related expenses (such as childcare, transport, and clothing needs) and other benefits (such as health care cover) would help to smooth that transition.

Poverty related to personal employment histories is a growing issue confronting OECD countries. The disadvantaged economic position of many older women signals a problem that may become more generalised. Private sector contributory superannuation schemes or insurance payments based on past earnings discriminate against those who have spent significant periods outside the labour market. Periods of non-market activity, in the case of women, are usually dictated by responsibilities for family care - and are sometimes followed by early withdrawal from the labour market to coincide with a spouse's retirement. Time spent out of employment seriously limits women's ability to plan for income security in old age. When coupled with their relatively low lifetime earnings, this means that women's accumulated entitlements tend to be meagre. Older women are an increasingly vulnerable group, especially given the mounting pressure on state-funded old-age pensions.

More longitudinal research is required to assess the full economic effects of non-continuous employment histories. It should examine variables such as increased life expectancies, changing life and employment patterns, the age of entitlement for retirement pensions, and the extent to which those factors together affect the ratio of market to non-market activity across the lifecycle. This will indicate policy directions likely to lead to enhanced economic security for women.

There is clearly a need to introduce flexibility into social security schemes to match the diversity of personal situations. Schemes have to be redesigned to account for the whole range of employment situations, as well as diversity in family structures, and the needs of those performing socially necessary domestic and community functions. Preservation and portability of employment-related entitlements is important for ensuring long-term economic security over lifecycles that will increasingly include periods out of the paid workforce. Entitlements to social protection need to be established for those involved in informal sector activities, especially where contributory social insurance schemes are the primary means of income protection.

A social security system based on individual entitlements is likely to improve women's access to social protection. Joint-income testing - using the household as the unit of assessment - is based in the assumption that income is pooled and redistributed between family members. A woman finding herself out of work through unemployment or illness is likely to be refused a benefit on the basis of her partner's income - which she may or may not have access to. Joint-income testing also creates disincentives to women's labour market participation.

In most OECD countries that tax system is now based in the individual as the unit of assessment. Applying the same rule to social security enhances consistence and promotes the principles of personal autonomy and economic independence. It also helps to reject the notion that women's incomes are supplementary to and therefore dispensable portions of overall family income.

Co-ordination of social security regimes with social and labour market insertion programmes would promote mobility between market and non-market areas of activity. Social insertion programmes can assist the older and long-term unemployment to engage in activities that enhance their social participation. Participation in these

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programmes will be greater if the activities offered are meaningful and allow opportunities for skills enhancement. The revaluation of domestic and community activities is likely to enhance the status of social insertion programmes and to improve the take-up rate. The spin-off for society is the provision of socially necessary community services.

Directions for Action

Acknowledge the social and economic value of non-market forms of activity and the interdependence between market and non-market activities.

Develop mechanisms to assess the skills transferability and meet the training needs of individuals involved in non-market activities.

Address the long-term income and social protection requirements of individuals whose lifecycles includes periods of non-market activity.

Ensure that social security regimes and social and labour market insertion programmes increase the opportunities and incentives for both social and economic participation.

DECISION-MAKING: PARTICIPATION AND RESPONSIBILITY

Decision-making systems must be responsive to change, Increased participation by a variety of actors will enhance both the effectiveness and the democratic foundations of decision-making systems. Empowering women to participate in collective decision-making is essential for effective structural adjustment. Monitoring forms an integral part of decision-making systems.

A pluralistic decision-making system

Effective structural adjustment depends on decision-making systems that are responsive to structural change and the changing needs of the populations they serve. Active involvement by a multiplicity of actors will ensure that a broad range of needs and contingencies are accounted for. Participation by currently under-represented groups needs to be enhanced. This requires a decision-making process that is both transparent and accessible. Responsive decision-making systems will reinforce the effectiveness and coherence of decisions as well as their democratic foundations.

Women as decision-makers

Decisions that determine the shape of structural reform currently suffer from the lack of women's input. Those decisions are made in forums and groups that are predominantly masculine, and tend to reflect the values, perspectives and the life experiences of the people who make them. Improving women's participation in collective decision-making can make structural adjustment policies more responsive to women's needs and to the growing diversity in life and employment patterns. Creating an environment that encourages women to assume greater decision-making responsibilities depends on addressing the current structural barriers to involvement. That means developing positive action mechanisms to empower women and to improve their political efficacy as well as making the decision-making process more transparent and accessible.

The presence of women in the arenas of political and economic power is relatively recent. In a number of OECD countries, neither women's suffrage nor individual right to work was established until after World War Two. Women still lack the numbers to band together to influence decisions or to challenge the stronghold that men maintain over the bulk of "strategic" decision-making positions. Women in leadership positions often report feeling isolated by a lack of peer support and by having to operate according to rules of the game designed for and by men.

Specific measures are required to increase the numbers of female decision-makers, especially in representative decision-making bodies. These include programmes to encourage women to put themselves forward for positions, and setting up special structures to represent women's interests. Some political parties and unions have chosen quotas as one way of increasing women's participation. In a few OECD countries, legislation requires all public commissions and committees to include a given proportion of women - on the assumption that women are a distinctive group on society which requires specific representation. This has had positive effects on the relative priority attached to issues of concern to women in those countries.

Having a few women in positions of power does not necessarily mean that the multiplicity of women's views and life situations will be adequately represented. A general improvement in women's ability to articulate their needs and concerns into the decision-making process is also required. Women need a basic knowledge of how the system works and access to information about issues on the policy agenda. Establishing women in leadership

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positions, politicising issues of concern to women, and enabling women to have a say on the variety of agenda items, are all elements of a strategy to make decision-making systems more responsive.

Some aspects related to the functioning of the political decision-making process inhibit women's participation. Meetings held at times that are incompatible with family schedules, an absence of childcare facilities and services, rigid rules for making submissions and intimidating meetings procedures all tend to discourage women's political activity. New channels for enabling women to have input into the decision-making process are required. Community consultations, and seeking advice from the organisations and groups that women belong to - rather than limiting consultation to groups that are already vocal and articulate (such as business or men's community groups or clubs) - can help to solicit women's views. Appointing one or two women to a committee and expecting them to speak for all women is not enough. Building up networks is also necessary. This calls for a broadened definition of "social partners" that includes a wider range of representative organisations.

Women's influence in both the public and private spheres where economic decisions are made also remains rather limited. Women are now relatively numerous in middle management positions - as a result of their higher level of qualifications and their continuous labour force attachment. Despite this "feeder layer", they have not made significant in-roads into the realms of top economic management. The notion of the "glass ceiling" suggests a lingering resistance to appointing women to high level posts. Specific tools, such as the compilation of "nomination lists", might serve to challenge this resistance.

An overall improvement in women's employment status will help to increase the pool of qualified women from which to select managers. Rigorous implementation of equal opportunities legislation and other positive action measures is essential for that purpose. Special training programmes for women returning to the workforce, campaigns to encourage women into non-traditional occupations, special schemes to assist women's career planning and quest for management positions, and the development of women's mentoring systems are all examples of positive action measures to improve women's access to decision-making roles. These specific measures will complement the more general strategies outlined in the previous section on occupational segregation.

Responsive decision-making and public policy

The appropriate balance between decentralised and centralised decision-making is a matter of active debate in the current context of structural change. The drive for flexibility and the desire to be responsive to a variety of needs increases the pressure for decentralised decision making. Yet structural trends such as market globalisation and demographic aging indicate a need to take to account the broader environment, which calls for a centralised focus.

These apparently contradictory pressures have implications for the functioning of decision-making systems. Maintaining national standards and ensuring that policy objectives are being met - such as achieving gender equity - is more difficult when decisions are decentralised. The role and methods of intervention by general government need to be redefined. Co-ordinating the different actors is a major challenge.

Coherent and consistent public policy also depends on effective co-ordination between policy-making bodies. The preceding sections have highlighted numerous instances where co-ordination between various government agencies is needed, to account for possible externalities and to achieve integrated and effective policy. For example: employment, social security, taxation and childcare policies all interact to influence the social and economic participation of lone parents. Responsive decision-making requires a greater decompartmentalisation of policy.

Government agencies need to be responsive to their clients - female as well as male. The existence of specific women's ministries does not mean that other agencies should abdicate their responsibilities to address women's needs and concerns. Some OECD countries have taken this challenge on board, by implementing mechanisms that require government agencies to report publicly on the relevance of their policies and programmes for women, and to outline any specific women's initiatives. The purpose is to elevate women's concerns on the policy agenda.

Decision-making and the labour market

Redefining roles for the different levels of decision-making is particularly important in the context of the functioning of the labour market. Globalisation is driving rapid growth in the international labour market. Rules set at the national level for the national context, increasingly have to take the international environment into account. In parallel, there is a need for greater international involvement in rule setting.

Regulation defined at the international level can only be very general. Legislation and collective bargaining will increasingly operate as complementary avenues for action at the national level. The relative role of each process in defending employment norms and working conditions depends very much upon the existing industrial relations system - the differences between OECD countries on that level are considerable. Despite the differences, there is

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a common need to strengthen women's participation in collective bargaining.

The process of structural reform has put considerable pressure on unions and employer organisations. Both devote increased attention to structural adjustment, especially in highlighting the need for training. Equal opportunities is also increasingly on their individual and joint agenda. However, like other institutions, neither employers organisations or unions have yet developed a comprehensive approach to incorporating equity and adjustment strategy into a coherent response to structural trends.

Increasing women's involvement in union and employer decision-making would help to develop an integrated approach to structural change. This is necessary to ensure that women's working conditions and positions are improved or at least maintained in the face of adjustment. Women's role in collective bargaining is currently limited by a range of factors. The dearth of women in senior management positions in enterprises means that they are also less likely to be represented in employer organisations. Women tend to be employed in areas dominated by small enterprises, where it is difficult to organise both employers and workers into the sort of negotiation models operating in other sectors. Women also increasingly work under atypical conditions of employment, most of which fall outside the collective bargaining process. As a result, women generally have lower rates of unionisation. Even where they are highly unionised - such as in the public sector or in countries where for institutional reasons the general level of unionisation is high - women are not well represented in decision-making positions.

Increased involvement by women in unions, and employer organisations - particularly in decision-making positions - and the development of new innovative consultation and negotiating structures that include workers and employers currently under-represented in collective bargaining, would considerably reinforce the role of industrial relations in promoting adjustment based on better utilisation of human resources and responsiveness to workers needs and aspirations. This would benefit all workers, regardless of gender.

Whichever way industrial democracy develops in future, there will be a role for central regulation in relation to setting minimum standard and conditions for a fair and just working environment - including rules against gender discrimination. Strict enforcement of these basic rules is required. Governments are currently re-evaluating a whole range of existing regulations - and the extent to which some need to be strengthened or removed. Whether the existing regulatory framework can accommodate adjustment or whether a totally new framework is indicated needs to be determined. The role of regulations in improving the situation of women needs to be addressed throughout.

Monitoring progress

The relative success of strategies introduced to enhance the responsiveness of the decision-making process needs to be assessed. Setting goals and timetables is essential for achieving cumulative results, and also offers a sound basis for monitoring progress. Effective monitoring presupposes the development of comprehensive data and information on women's employment status, as well as indicators of improvement or deterioration. This information is still lacking in many OECD countries; in some cases data is not even systematically disaggregated by gender.

Responsibility for monitoring and assessment needs to be defined. Many OECD countries already have machinery of government that could assume this function. Women's ministries, equality councils and other similar organisations can collaborate with those responsible for the collection of national statistics to develop equity indicators. It is crucial that statistics on women are part of mainstream data collection and are given full visibility.

Directions for Action

Implement positive action measures to improve women's direct representation in economic, social and political decision-making forums.

Promote effective and accessible channels for women to articulate their needs and concerns into the decision-making process.

Improve the coherence and consistency of policy as it impacts on women, in particular through effective co-ordinating of the actors.

Set goals and timetables for achieving women's full participation in the process of structural change.

Monitor structural reform and develop appropriate statistics and indicators to assess the position of women.

ENHANCING INTERNATIONAL CO-OPERATION

Globalisations and increased interaction between national labour markets calls for cross-country monitoring and greater international co-operation.

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The proposals discussed in this report are intended by the researchers as a contribution towards a European Community in which women and men participate on equal terms. It is argued that these proposals, if adopted, will not only result in a better position of women, but will also enhance society as a whole. If an active social policy is sought, existing marginalization of women must be eliminated and future marginalization must be avoided at all costs. Only then can the European Community call itself a Community for and by its citizens.

Globalisation brings increased interaction interdependence between national economies. A new international division of labour is being driven by the global structuring of production. This affects migration flows and the conditions of competition and employment on national labour markets. The need for international co-operation and a co-ordinated approach to structural reform is reinforced under these circumstances. This report has stressed that structural reform needs to address the economic and social status of women. International organisations provide an ideal forum for inter-country comparisons of structural adjustment, and for fostering dialogue on approaches to integrating gender equity issues into the international policy-making process.

The OECD has an existing mandate to conduct multilateral surveillance of structural reform. The monitoring process - including gathering and disseminating information and conducting regular country reviews - should apply to the performance of Member countries in meeting equality objectives in the context of structural reform. Including gender equity within the agenda of structural adjustment requires that those issues also penetrate the work of the various OECD committees dealing with the matter. New models of interaction - bringing together groups and issues that have hitherto been separated institutionally - would facilitate cross-fertilisation of ideas and approaches to structural change. This is consistent with efforts to develop an integrated and coherent approach to policy both within the Organisation and in national capitals.

There is a definite role for international organisations to foster dialogue on integrating gender-equality issues into the international policy-making process. Additional "rules of the game" specifically related to women and structural adjustment have to be defined at the international level. Attempts to orient structural change along the lines indicated in this report, at the national level will not produce full results if international flows - trade and labour. Enhanced international co-operation is needed to promote the economic status of women at the international level.

Directions for Action

OECD to include the status of women in the context of cross-country comparisons and surveillance of structural reform.

OECD to foster dialogue on approaches to integrating gender equality issues into the international policy-making process.

Fout! Bladwijzer niet gedefinieerd.